Supreme Court, U.S.
FILED

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM G. IANNACCONE, Plaintiff in Interest &
Administrator/Co-Committee for the
Estate of PETER IANNACCONE,

&

ELEANOR IANNACCONE, Proper Party Plaintiff
Co-Committee for the
Estate of PETER IANNACCONE

PETITIONERS

Vs.

KENNETH S. APFEL, Defendant,
Commissioner of Social Security

&

MARIE LAW, Proper Party Defendant,
Former fiduciary of SSA funds payable for
PETER IANNACCONE,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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163 pp

QUESTIONS PRESENTED

***

I. Whether Plaintiff's Constitutional Guarantee of Due Process of Law as provided by the Fifth Amendment is being violated due to the Defendant SSA Commissioner's violation of federal statute 5 U.S.C.S. sec. 552 a (e)(5), and/or 5 U.S.C. sec. 552 a (d)(1), depriving Plaintiff to the SSA records required in proving his cause for further remedial compensation as Plaintiff in Interest, and/or as the current legal court appointed delegate as Administrator of the estate of PETER IANNACCONE, deceased, and/or as the current legal court appointed Co-committee, serving in such capacity along with Eleanor Iannaccone , Proper Party Plaintiff & fellow Petitioner to this Supreme Court, for the Person and Property of PETER IANNACCONE, an Incompetent Person, as provided under 5 U.S.C.S. 552 a (h); 20 C.F.R. 401.405,

II. Whether, pro se Plaintiff, as the prevailing party in a case against the SSA Commissioner, should be awarded pecuniary compensation for reasonable pro se litigation fees, in light of 5 U.S.C. 552a (3)(A)(B) and/or under the Equal Access to Justice Act; 28 U.S.C.A. sec. 2412 (d)(1)(A); Social Security Act seq. 1 et esq., as amended, 42 U.S.C.A, sec. 301 et seq., and/or Freedom of Information Act 5 U.S.C.S. sec. (a)(4)(E),(F), where the Commissioner's position in opposing remand of the case to develop the record for proving Plaintiff's cause is not substantially justified, and where Plaintiff has established in the record his diligent search for and rejection by multiple counsel and failure of the Erie County Bar Association's legal referral service to locate an attorney for referral to pro se Plaintiff

III. Whether a conflict of interest exists below, by the WDNY United States Attorney's Office by having Assistants Ms.E Fleming and Ms.J.B.Wolfe, opposing further disclosure of SSA records, while having Mr. R.D. Kaufman, Assistant WDNY, U.S. Attorney in support of disclosure of SSA records for criminal investigations.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

William G. Iannaccone & Eleanor Iannaccone respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Summary Order of the Court of Appeals, No. 00-6185 (2nd Cir. January 17, 2001) App. H, is not reported. The final decision of the District Court No. 95-CV-555 (S) for the (W.D.N.Y.) was issued Mar. 31, 2000, App. F. The Opinion of the Court of Appeals No. 97-6045 is reported at 142 F.2d 553 (2nd Cir. 1998), App. E. The Order of the District Court dismissing Complaint, was issued Jan. 23 1997, App. C. The Order of the District Court to obtain counsel was issued Nov. 14, 1996, App. B. The Administrative Law Judge's Decision was issued Aug. 18, 1994, App. A, is not reported.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 17, 2001, App. H.

A timely petition for rehearing was denied by the United States Court of Appeals on May 3, 2001, and a copy of the order denying rehearing appears at App. I.

The SSA, is an agency of the United States, so service was made on the Solicitor General of the United States in accordance with rule 29.4 (b), in addition to those listed on Plaintiff's Certificate of Service, filed with the Clerk.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: No Person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 5 U.S.C. Section 552a. Records maintained on individuals

(e) Agency Requirements. - Each agency that maintains a system of records shall -

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

3. 5 U.S.C.Section 552a. Records maintained on individuals

(h) Rights of Legal Guardians. - For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

4. 5 U.S.C. Section 552a (d) Access to Records. - Each agency that maintains a system of records shall –

1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(g)(1) Civil Remedies. - Whenever any agency

(B) refuses to comply with an individual request under

subsection (d)(1) of this section;

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

5. 5 U.S.C. Section 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT OF THE CASE

Brief history of the case.

PETER IANNACCONE, Plaintiff's father, was born March 2, 1911. Mamie Iannaccone, PETER'S spouse was born March 30, 1918. They were married in 1938. PETER obtained a legal separation from Mamie in 1945 and was living apart for divorce, but was instead involuntarily confined to the Canandaigua Veteran's Hospital, an action initiated by his spouse, at that time, where he remained until 1968. The Co-Committee testified before the ALJ that PETER underwent unusual and cruel treatments as a ward of the Veteran's Administration, that resulted in PETER'S psychological demise.

Mamie died in October 1978, fully insured. PETER IANNACCONE died in April 1992, with no history of employment subsequent to his Honorable discharge from WWII service in 1944.

Plaintiff was granted letters of Administration upon his father's estate on November 5, 1992, still valid and in full force.

Plaintiff and PETER'S niece Eleanor Iannaccone were appointed in October 1989 as the Co-Committee for PETER IANNACCONE, whom was declared an Incompetent Person in 1960, but had no Committee appointed for him until June 1984, at which time Horace A. Gioia, Esq., a non-family member was appointed until discharged in October 1989, due to complaints by PETER'S family of nonfeasance and malfeasance, relative to PETER'S interests in his spouse's estate. The current Co-Committee, appointed in 1989, is still valid and in full force.

Plaintiff filed Complaint in the District Court below on July 11, 1995, App. R , pgs.69-85, for a review of the Administrative Law Judge's (ALJ) decision of August 18, 1994, App. A, pgs. 69-85, as provided under section 205 (g) of the Social Security Act, as amended (42 U.S.C. 405 (g)).

Plaintiff's principle argument in the proceedings below is that the ALJ relies on fabricated evidence, identified by the ALJ as follows: Exhibit # 23, App. N, pg.67, to erroneously conclude that when Mamie's October 1976 SSA Disability application was filed it failed to seek benefits for PETER on Mamie's account, as the fully insured wage earner, App.A,

pg.6; Exhibits # 21 & #22, App N, pgs. 60-65, to erroneously conclude that when PETER'S SSA application was made for him in November 1976, at age 65, that it was filed incorrectly on his own account for Retirement Insurance, but not correctly for Husband's Insurance benefits, as Mamie's spouse, App. A, pgs 3,6.

Plaintiff argues that the ALJ erred in offering no proof in determining that when an application was made for PETER for the lump-sum death benefit on Mamie's account, App. A, pg. 67, subsequent to October 15, 1978, that no application was correctly filed for PETER for Widower's Insurance benefits, App. A, pg. 6.

Further, Plaintiff proves that the ALJ failed to develop the SSA Administrative Record to include the evidence that shows that PETER'S income, consisting of %100 Disability Veterans Administration benefits paid for PETER since 1945, of which his spouse exercised control, was never reported to the SSA as belonging to PETER, as shown by the evidence entered into the record by Plaintiff in USDC (Doc.#36), as Exhibit "A", App. S, pg. 105. The ALJ has erroneously contended that PETER was not actually financially dependent upon Mamie in November 1976, as would have been required under the law, at that time, for entitlement as Mamie's spouse, App. A, pg. 6.

Plaintiff's primary contention in the proceedings below, is that the SSA Commissioner's implication, as made by the SSA record, App. R, pg. 85, and informal declaration made to Plaintiff, by letter from Harvey Pessar, dated 3/5/98, App. Q, pg. 68, that the SSA files of PETER and Mamie Iannaccone, created prior to September 1984, were destroyed (which would be a violation of federal rule 5 U.S.C.S. sec. 552 a(e)(5)), is not credible.

Plaintiff's primary objective in the proceedings below is to have the SSA Administrative record fully developed that would include the probative evidence, being the SSA applications made for PETER and Mamie Iannaccone, prior to September 1984, to prove Plaintiff's cause as defined in his Complaint that PETER and Mamie's SSA applications filed with the SSA in 1976 and PETER'S application filed after October 15, 1978, were filed correctly and that payments were made for PETER, inclusive of October 1976 through June 1983, but converted by the former fiduciary custodian of PETER , Proper Party Defendant Marie Law, PETER'S sister-in-law and were not accounted for during the deposition of Marie Law, taken on

January 8, 1985, as the former Executrix, in the matter of the estate of Mamie Iannaccone.

The ALJ'S decision made August 1994, had awarded Plaintiff, as the sole surviving son on behalf of PETER, under rule 42 U.S.C. sec. 404 (d); 20 C.F.R. sec. 404.503 (b)(5)(7)(d), benefits that were due to PETER from July 1983 through April 1992 based upon misinformation that was provided to PETER and Plaintiff, by SSA personnel, in response to Plaintiff letter of inquiry dated January 25, 1984, providing information for investigation into SSA entitlements available for his father, whom Plaintiff was living with and caring for at that time, App. A, pg. 10.

The ALJ under 42 U.S.C. sec. 402 (j)(5), deemed PETER'S application as filed on January 25, 1984, the date of Plaintiff's letter and ordered the Administration to make retro-active payments to Plaintiff on behalf of PETER. Plaintiff had filed an application on April 23, 1992, to be selected as representative payee. Plaintiff, also submitted evidence to the SSA at that time of April, 1992 that he and Eleanor were the court appointed Co-Committee for PETER, as shown by the SSA record, App. R, pg.84.

The SSA Commissioner in response to Plaintiff's Complaint filed in the District Court his dispository Motion for Judgment on the Pleadings, USDC (Doc.#19),on 3/5/96, contending that the ALJ'S decision was supported by substantial evidence and should be affirmed.

Plaintiff filed his repliant Motion for Non-affirmance of the SSA Commissioner's Determination for Judgment on the Pleadings, USDC (Doc.#36),on 8/12/96, App. S, Pgs. 86-105. Embodied in this motion Plaintiff submitted the original Affidavit of SSA representative, Miss. Keller, subscribed on Aug.6, 1996, App. N, pgs. 56-58, who reviewed the ALJ'S Exhibits # 21 and #22, App. N, pgs. 60-65, to conclude, under oath, that such evidence is not proof that PETER and Mamie's SSA applications made in 1976 and around 1978, seeking SSA entitlements for PETER, were filed incorrectly. And who verified that PETER'S income was not reported to the SSA when his application was filed for him in November 1976, thus allowing PETER to prove dependency on Mamie, for SSA entitlement, at that time.

District Court Judge William M. Skretny issued an Order Nov. 14, 1996, directing pro se Plaintiff/Administrator to obtain counsel by Jan. 15, 1997, to represent PETER'S estate,

citing N.Y. McKinney's Judiciary Law sec. 478, App. B, pgs. 11-12.

Plaintiff filed his Notice of Initial Compliance to Order issued Nov. 14, 1996, requesting an enlargement of time to comply with the order for obtainment of counsel, on Jan. 13, 1997. Plaintiff submitted his affidavit in support of his motion, App.T, pgs. 106-118, extensively documenting his diligent search for counsel, both prior to the commencement of this action in District Court and following the Nov. 14, 1996 Order, in which Plaintiff attached several Exhibits of letters he received from multiple counsel, whom were practitioners of Social Security Law, whom declined to represent Plaintiff, in this matter.

Further, Plaintiff attached Exhibits, with his affidavit, that included documentation he received from the Erie County Bar Association's Lawyer Referral Service, addressed to Plaintiff, confirming their inability to locate counsel for referral for Plaintiff, in this matter, both prior to the commencement of this action in District Court and subsequent to the Nov. 14, 1996 order, App. T, pgs. 107-109.

District Court Judge William M. Skretny, issued an Order on Jan. 24, 1997, with Judgment, denying Plaintiff's Motion for Enlargement of Time to comply with the Order to obtain counsel and dismissed Plaintiff's Complaint without prejudice, App. D, pg. 14.

Plaintiff timely filed an appeal to the Second Circuit, Docket # 97-6045.

The Second Circuit issued an opinion recorded at Iannaccone V. Law, 142 F.3d 553 (2d Cir. 1998), App. E, pgs. 15-27, which remanded the action for further proceedings in the District Court, reversing the dismissal of Plaintiff's pro se claim against the Commissioner based on the finding that "the action in district court should have been deemed plaintiff's own case and not a suit belonging to the estate of plaintiff's father," and cited rule 42 U.S.C. sec. 404 (d); 20 C.F.R. 404.503 (b)(5)(7)(d) which gives Plaintiff, PETER' S son, as the party in interest, priority over the estate, App. E, pg.26, 27.

The Second Circuit, Id at 559, affirmed the District Courts dismissal of Plaintiff/Administraor's claim, on behalf of PETER'S estate against Marie Law finding that "clearly Plaintiff was purporting to represent the estate in litigation an interest specific to the estate, that is, whether Law misappropriated Social Security benefit payments intended for

PETER IANNACCONE, when he was living," as violate of New York Judiciary Law sec. 478, because Plaintiff is a non-lawyer, App. E, pgs. 25, 27.

Further, the Second Circuit in Iannaccone V. Law, F.3d at 560 declared "Having decided that Plaintiff may properly appear on his own behalf without counsel in this proceeding, we decline to address plaintiff's arguments regarding the merits, including the failure of the ALJ to fully develop the record and the issue of whether Law was a proper defendant in this case, because these issues are not properly before us," App. E, pg. 27.

The District Court Judge, William M. Skretny, issued his final decision with Order filed on March 31, 2000, App. F pgs. 28-37, and Judgment filed April 3, 2000, App. G, pg. 38, granting Defendant SSA Commissioner's dispositive Motion for Judgment on the Pleadings, thus affirming the ALJ's determination. The District Court denied various motions made by Plaintiff, but did not specifically mention denying Plaintiff's Motion for Non-affirmance of the Commissoner's determinsation for Judgment on the Pleadings, (Doc.#36), App. F, pg. 37.

The District Court Judge erroneously concluded that since the Second Circuit in Iannaccone V. Law, 142 F.3d 553 (2nd Cir.1998), affirmed the District Court's dismissal of Plaintiff/Administrator's pro se claim against Marie Law, Plaintiff thereby lost his right to have the SSA Administrative Record fully developed, in Plaintiff's action, as party in interest, against the SSA Commissioner, for disclosure of the probative evidence, inclusive of the SSA applications made for PETER and Mamie Iannaccone, prior to September 1984, that the SSA has informally claimed to have destroyed in 9/84, which would be a violation of federal law, that Plaintiff asserts, at passim, in the record, were filed correctly for SSA entitlements for PETER, for proving Plaintiff's cause.

The District Court Judge in his final decision of March 31, 2000, mistakenly states that, "Plaintiff's arguments and demands for discovery are premised on the mistaken belief that he may still pursue a claim pro se against Marie Law for this alleged misuse of funds. As discussed, supra, any such claim for misuse, to the extent that one can be asserted, belonged to the Estate, which Plaintiff may not represent, pro se, App. F, pgs. 34, 35.

Plaintiff timely appealed to the Second Circuit filed in Docket # 00-6185, arguing in his brief that the District Court's decision and order filed March 31, 2000, must be reversed, and remanded, since the SSA Commissioner's determination can not be upheld when it is based on an erroneous view of the law that improperly disregards highly probative evidence, as provided in Grey V. Heckler, 721 F.2d 41.44 (2d Cir.1983); Marcus V. Califano, 615 F. 2d. 23, 27 (2d Cir.1979).

Subsequent to Plaintiff's filing his brief the SSA Commissioner agreed to calculate and pay spouse's and widower's benefits to Plaintiff, as survivor of PETER for the months from October 1976 through January 1984. See Iannaccone V. Apfel, No 00-6185 (2d Cir. Jan. 17, 2001) Summary Order, App H, pg. 41. The reason given by the SSA Commissioner, in his brief filed in 00-6185, for this abrupt change of position, (after over 15 years since responding by written misinformation to Plaintiff's letter of inquiry to the SSA of Jan. 25, 1984, denying eligibility for PETER to SSA benefits including Medicare although PETER was age 73, at that time), is that, while still maintaining that PETER'S November 1976 application was filed incorrectly (without proof) that due to the SSA'S recent consideration of PETER'S incompetence (a fact known by the SSA since April 1992, by documentation of court order showing incompetence as shown by the Administrative record App. R, pg. 85) the SSA Commissioner is (only now) willing to construe his (PETER'S) retirement application (without proof that an application for spousal benefits was not correctly filed) as an application for spouse's benefits. App. AA, pg. 134.

Conversely, Plaintiff intends to prove by the fully developed administrative record that the SSA, since January 1984 has attempted to conceal by the withholding of the probative evidence, the fact that the SSA is guilty of malfeasance, due to their supervening negligence resulting from the insulating of Proper Party Defendant Marie Law, an alleged antecedent tort-feasor, an offense made while acting in a fiduciary capacity, as former Executrix of the Estate of Mamie Iannaccone, whom failed to reveal her knowledge of and account for those SSA payments issued for PETER, since October 1976 through 1984, that were in her control as the "custodian" of PETER, during her deposition taken under oath on January 8, 1985, in the matter of the estate of Mamie Iannaccone.

Plaintiff argued before the panel at the oral hearing that took place on January 10, 2001, transcribed for the record in file 00-6185, that "Plaintiff's pro se claim against the Defendant SSA Commissioner, as upheld by this Courts opinion of April 27, 1998, (in Iannaccone V. Law, 142 F.3d 553 (2d Cir. 1998)) , legally and properly , enables Plaintiff to move against the SSA Commissioner to produce the November 1976 application made for PETER IANNACCONE that Plaintiff asserts was filed correctly for spousal benefits.", App J, pgs. 45, 46.

REASONS FOR GRANTING THE PITITION
QUESTION I

I. The United States Court of Appeals for the Second Circuit, Summary Order of January 17, 2001, has so far departed from the accepted and usual course of judicial proceedings; has sanctioned such departure by the courts below; and has conflicted with relevant decisions of this court, to such an intolerable degree, that this Honorable Court must bring Plaintiff's cause into the light of justice, as the rules of law, as sanctioned by Congress intended.

Plaintiff's cause is not made moot by Defendant's pre-emptive strike to the womb of justice in deceiving the Second Circuit with fallacious facts in furthering a false pretext while blatantly violating federal law in rule 5 U.S.C.S 552 (a)(e)(5), to maintain the SSA records, and the withholding of the probative evidence Plaintiff's seeks for proving his cause, in violation of federal rule 5 U.S.C. sec.552 a (d) (1).

Plaintiff's statutory rights include 5 U.S.C.S. sec. 552 a (h); 20 C.F.R. sec. 401.405 and rule 45 C.F.R. sec. 56.5 (a)(1) for disclosure of all the SSA records pertaining to PETER IANNACCONE, as the court appointed Co-Committee and Administrator for the Person and Estate of Peter.

Plaintiff, along with Proper Party Plaintiff Eleanor Iannaccone, have long made known to the SSA, and the courts below, that it is their legal right, as provided under federal statute, to have access to all the SSA records pertaining to PETER, in this action against the SSA Commissioner, from the time of their written correspondence to the SSA Administration, since April 1992; by their oral testimonials before the ALJ in July 1993; and in litigation of this action, at passim, since the commencement of the action in District

Court, to twice before the Second Circuit. Further, the Co-committee had taken all necessary steps to formalize this request for access to PETER'S records by their Affidavits for Disclosure, submitted to the record in docket 97-6045, and granted as filed on 9/26/97, and then granted as filed on remand to the District Court file CV-95-555 (S), on 5/12/98. See Affidavits of Disclosure at App. 119 & 120.

Further, the United States Court of Appeals for the Second Circuit had the authority in this case, in 00-6185, for remand to the SSA for the addition of those records vital to Plaintiff's cause for full and fair relief, as provided in Webb V. Finch, 431 F.2d 1179 (1979 CA6).

The SSA, notwithstanding the fact that it has agreed to make payments owed to PETER from October 1976 through January 1984, must not be permitted to obstruct justice by refusing to comply with pro se Plaintiff's statutory rights and case law rights to the incriminating probative evidence, inclusive of the SSA records of applications made for PETER and Mamie Iannaccone, made prior to Sept. 1984, that the SSA has informally claimed to have destroyed, in this action against the SSA Commissioner, where the exercise of Plaintiff's statutory rights and case law rights to PETER'S SSA records will provide Plaintiff with the evidence that he requires to prove a cause of action against Proper Party Defendant Marie Law, for further remedial compensation including interest that Plaintiff may then pursue, inclusive of other related actions. As well, as sanctions, including fees, against the SSA Commissioner for the willful withholding of incriminating evidence in violation of federal statutes

Thus this action has not become moot as contended in the Second Circuit's Summary Order of January 17, 2001, herein on appeal, since the denial of Plaintiff's statutory rights and case law rights to have access to the SSA records pertaining to PETER would deny Plaintiff of full remedy, since the interim relief of the SSA payment, does not "completely and irrevocably eradicate the effects of the alleged violation" for all interested parties to the action, thus is not uniformly consistent with what this court decide in County of Los Angles V. Davis, 440 U.S. 625, 631 (1979) (quoting United States V. W.T. Grant Co., 345 U.S. 629,632 (1953).

Of critical importance to be considered by this Honorable Court is that this case involves an obvious conflict of interest on behalf of the WDNY U.S Attorney. The SSA records that

Plaintiff is statutorily entitled to, inclusive of the SSA applications made for PETER and Mamie prior to 1984, that the SSA has not yet produced in violation of federal statute, in order to fully develop the Administrative Record, will upon disclosure most likely inculpate Proper Party Defendant Marie Law for the criminal offense of grand larceny, while acting in a fiduciary capacity and committed against PETER, an Incompetent Person, which is now a continuing theft from PETER'S estate. Incompetents are subjects of no statute of limitations, because they cannot possibly assert their own interests. And they should not be prejudiced by delays of any surrogate acting for them, or on behalf of their estate.

The U.S. Attorney for the WDNY has jurisdiction for the investigation and prosecution of such criminal offenses involving the embezzlement of federal SSA funds belonging to PETER, and now to his estate.

The conflict of interest arises, due to the fact that in one instance, Mr. Richard D. Kaufman, Assist. U.S. Attorney, by letter addressed to Plaintiff, dated 4/24/98, App.W, pg.121, which was entered by Plaintiff into the District Court record on 9/8/98,(Doc.# 52) as Exhibit "J," refers Plaintiff to Federal Rule of Civil Procedure 26 et al, "in order for you to use the full extent of your rights in completing your discovery," for the disclosure of the inculpatory SSA records that Plaintiff seeks in proving his cause.

Yet, in the second instance Ms. Mary Pat Fleming, Assist. U.S. Attorney and Ms. Jane B. Wolfe, Assist. U.S. Attorney, both of whom have represented the Defendant SSA Commissioner in the action below, have argued for the granting of the Commissioner's dispositive Motion for Judgment on the Pleadings, upholding the ALJ'S decision of August 18, 1994, and opposing remand to develop the record. And where, Plaintiff has substantiated in the record that the ALJ had relied on the fabricated evidence and seeks to fully develop the record that includes the probative evidence.

Although, this issue of a conflict of interest, by the U.S. Attorney, as discussed supra, was brought before the District Court, by Plaintiff, whom then ordered the parties to enter memorandum on the issue, which was made, the District Court did not properly resolve this specific issue, by any declaration.

Plaintiff should not have to resort to bringing this entire matter before the Governor of New York State for the

appointment of an Independent Prosecutor, as provided by State ex rel. Wild V. Otis (Minn) 257 NW 2d 361, cert den and app dism 434 US 1003, 54 L Ed 2d 746, 98 S Ct 707.

This Honorable Court must provide Plaintiff the remedy he is entitled to by implementing Plaintiff's guarantee to due process of law as provided by the Fifth Amendment to the United States Constitution, in this case to prevent any further delay in justice to Plaintiff's cause.

REASONS FOR GRANTING THE PETITION
QUESTION II

The United States Court of Appeals for the Second Circuit by issuance of the Summary Order of January 17, 2001 has decided an important question of federal law that has not been, but should be settled by this Honorable Court.

The Summary Order of January 17, 2001, states generally that a pro se litigant is not entitled to an award of reasonable fees as compensation for work performed in this case citing Kay V. Ehrler, 499 U.S. 432 (1991).

However, an important question of federal law that should be settled by this Honorable Court is the finding that a pro se, as the prevailing party, in a case against the SSA Commissioner, should be awarded pecuniary compensation for reasonable pro se litigation fees, where the Commissioner's position in opposing remand of the case to develop the record for proving the cause is not substantially justified, and where pro se claimant provides documentation to the record of the action documenting a search for and rejection by multiple counsel to provide legal counsel, to pro se, at the onset of the action, which even includes the documentation of the failure of the Bar Association's Legal Referral Service, to locate an attorney for referral to pro se, as had occurred in this instant case.

Certainly, the Second Circuit's panel that heard the oral hearing on January 10, 2001, transcribed for the record, in docket 00-6185, make it known that they strongly feel that Plaintiff should receive remedial compensation for bringing forth this cause as the prevailing party to include fees for litigating this case, App. J, pgs. 49-52.

In a relevant case, Boyce V. Sullivan, 754 F. Supp. 126 (N.D. Ill.1990), with the exception that in this instant case,

Plaintiff is pro se, a distinct issue that will be discussed below, the District Court ruled in an SSA claim for award of attorney fees under Equal Access to Justice Act (EAJA) that (1) the Secretary (Commissioner) position in opposing remand of the case to more adequately develop the record regarding a claim was not substantially justified and (2) a fee award based upon $ 75. hourly rate, adjusted upward with consumer price index, was appropriate.

The EAJA is applicable to civil actions to review SSA decisions as provided by Berman V Schweiker, 713 F.2d 1290, 1296 (7th Cir. 1983).

For purposes of avoiding attorney fees award under EAJA, the government bears the burden of proving that its position was substantially justified. 28 U.S.C.A. sec. 2412 (d)(1)(A).

In this instant case the Commissioner's opposition to remand this case to fully develop the record to include the probative evidence for proving Plaintiff's cause, as discussed supra, is certainly not justified.

In this instant case the ALJ has the basic obligation to develop the record, especially where Plaintiff is unassisted by counsel, as provided by Cruz V. Sullivan, 912 F.2d 8 (2d Cir.1990).

In this instant case, Plaintiff prevailed by the award of payment by the SSA of benefits due to PETER from October 1976 through January 1984,only after several years of litigation by pro se Plaintiff, App. H, pg. 42.

In Boyce V. Sullivan, 754 F. Supp. 126 (ND.Ill. 1990) the District Court ruled that the ALJ did not adequately develop the record, the Secretary's position was not justified, thus the claimant was entitled to attorney fees as the prevailing party under EAJA . 28 U.S.C.A. sec. 2412 (d)(1)(A); Social Security Act seq. 1 et seq., as amended, 42 U.S.C.A. sec. 301 et seq.

For reference, a pro se claimant who is a licensed attorney has been held eligible to obtain an award of attorney fees under EAJA. Jones V. Lujan, 280 US App DC 87, 883 F2d 1031, application gr 281 US App. DC 105, 887 F2d 1096, 107 ALR Fed 873.

This Honorable Court should find that in this instant case, pro se claimant should be awarded compensation for litigation fees, relative to the reasoning discussed supra, together with the reasoning addressing the specific issue of pro se, being a non-attorney, as discussed below.

The panel of this court in Iannaccone V. Apfel, No. 00-

6185 (2nd Cir. January 17, 2001). Summary order states generally that a pro se litigant is not entitled to an award of reasonable fees as compensation for work perform in this case, citing Kay V. Ehrler, 499 U.S. 432 (1991), App. H, pg. 41.

Yet, unfairly, Plaintiff, if he were not successful in this cause, would be subject to liability to Defendant SSA Commissioner and Marie Law, for attorney fees.

This Honorable Court must approach Kay V. Ehrler, cited supra, qualitatively, while interpreting this case to deduce its most basic fundamental intent.

First, the Supreme Court opinion in Kay V. Ehrler, cited supra, applies distinctly to pro se litigants whom either have chosen upon their own free will to represent themselves in a cause, whether they be lay persons or members of the bar or those pro se litigants that due to incarceration have been limited in their liberty to exercise their free will to seek and receive independent counsel.

In this instant case, however, none of the criteria, discussed supra, apply to Plaintiff, since by testimonial given before the ALJ on July 15, 1993, (Transcript of the Administrative Record 353-354), herein at App. X, pgs 122-125, Plaintiff testifies that the reason he does not have an attorney representing him is due to the fact that no attorneys were willing to represent Plaintiff, in this cause, since 1989.

Plaintiff testifies before the ALJ on July 15, 1993, as discussed supra, to the fact that the Erie County D.A. had opened an investigation in 1986 that lasted through 1989, that received intense media coverage, into the operation of Surrogate's Court and attorneys involved with the estates of PETER and Mamie Iannaccone, and that involved the overall operation of Surrogate's Court with particular emphasis on the handling of appointing legal delegates to represent incompetent persons, minors and the disabled, in estate cases. Plaintiff submitted evidence to the ALJ at the time of the July 15, 1993 hearing, consisting of two letters sent by Mr. Richard D. Kaufaman, as Assist. District Attorney, addressed to Plaintiff, dated 8/1/85, App. Y, pg.126, and dated 5/4/89, App. Z, pg. 127, identified by the ALJ as Exhibits #29, that substantiate the investigations, by the Erie County District Attorney's Office, into the estates of PETER and Mamie Iannaccone; Marie Law the former Executrix of Mamie's estate; and attorneys involved with those estates,

being made, in conjunction with the investigation into the operation of the Erie County Surrogate's Court.

Plaintiff, further documented his intensive due diligence in attempting to secure counsel to represent this cause, to no avail, as documented by the exhibits of evidence, since June 1995, as submitted in Plaintiffs Motion of Initiatory Compliance to Order issued by the U.S. District Court on 11/14/96, with Motion of Enlargement of Time for Conclusion of Compliance to Order, for Plaintiff to obtain counsel, as filed with the District Court, below, on 1/13/97, (Doc.39). See Affidavit of Plaintiff, verified on 1/10/97, as contained in (Doc. 39), hereto at App. T, pgs. 106-118.

Also included in (Doc.39) is the Affidavit of Proper Party Plaintiff Eleanor Iannaccone, verified on 1/8/97, as Co-committee for PETER'S estate, pleading with the District Court, not to close this case.

Second, the most basic fundamental intent in Kay V. Ehrler, 449 U.S. at 432 (1991), is "to ensure the effective prosecution of meritorious claims," and at 437 "we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Third, the reasoning in Kay V. Ehrler, cited supra, in finding that "attorney assumes an agent relationship as the predicate for an award under sec. 1988", at 432, (42 U.S.C. sec. 1988) does not apply to this instant case, due to the fact that Plaintiff has documented his due diligence in attempting to secure counsel, to no avail, as discussed supra.

Fourth, the reasoning in Kay V. Ehrler, cited supra, at 432, that 42 U.S.C. sec. 1988's overriding concern is with securing counsel, to ensure the effective prosecution of meritorious claims, and that, "That policy is best served by a rule that creates an incentive to retain counsel in every case rather than a disincentive to employ counsel whenever a Plaintiff considers himself competent to litigate on his own behalf," is not applicable to this instant case, since Plaintiff has documented the rejection of multiple counsel declining representation of Plaintiffs cause, since June 1995, as discussed supra.

Fifth, the multiple rejections of representation by counsel, supra, renders as inapplicable the maxim that a pro se would be deprived of the judgment of an independent third party during the litigation, in this specific case. See, Kay V. Ehrler, cited supra, at 432.

Sixth, the multiple rejections by counsel, discussed supra, renders as inapplicable the U.S. Court of Appeals for the Sixth Circuit's affirmation of Falcone V. IRS, 900 F. 2d 967 (1990) at 971. And where, the dissenting judge for the Sixth Circuit, emphasizes, "the statutory goals of promoting lawsuits that protect civil rights and relieving the prevailing party of the burdens of litigation," Id., at 972-973.

Inter alia, the most obvious reasonable overriding intent of 42 U.S.C. sec. 1988 must be the prosecution of meritorious claims that otherwise would not be brought.

There are cases, notably those arising under the attorney's fees section of the Freedom of Information Act 5 U.S.C.S. sec. 552 (a)(4)(E), (F), in which courts have allowed non-attorney pro se, litigants attorney fees. See, e.g., Cox V. United States Department of Justice, 601 F. 2d 1, 5-6 (D.C. Cir.1979).

This instant case involves the release of information sought by Plaintiff to prove his cause, wherein Plaintiff has encountered undue and even unlawful opposition from the SSA Commissioner to fully develop the Administrative Record that certainly is not substantially justified.

Thus, the similarity of this instant case to Cox V. United States Department of Justice, whereat pro se litigant fees were granted must be considered. Thus, the specifics of this instant case, offers a significant parallel between 5 U.S.C.S. sec. 552 (a)(4)(F), wherein the awarding of attorney fees "is a useful sanction for unfounded resistance to a disclosure request." See, Lovell V. Alderete, 630 F. 2d at 437, and 42 U.S.C. sec. 1988, as applied to this instant case, since Plaintiff is deserving of compensation for pro se litigation wherein he has encountered undue and unlawful opposition from the SSA Commissioner in the pursuit of the SSA records of evidence. And, while having documented the rejection by multiple attorneys to represent Plaintiffs cause, since June 1995, supra.

This Honorable Court must see Kay V. Ehrler, 449 U.S. 432 (1991) in a new light with a refined conscience to view Plaintiffs role in this instant case as a pro se claimant whom has proven by the documented evidence, see, App.T, pgs.106-108, the most dire necessity, since being refused representation by multiple counsel from the time of June 1995, to bring forth this meritorious cause before this court, on his own without counsel.

For, as the profound overriding underlying purpose of 42 U.S.C. sec. 1988 is to encourage meritorious claims that might not otherwise be brought. See, Tobeluk V. Lind, Alaska 1979, 589 P.2d 873. Plaintiff has satisfied this overriding predicate for an award of reasonable pro se litigant fees as an award in equity that is both logical and fair and within the truest intent in the purpose of 42 U.S.C. sec. 1988.

This Honorable Court must give birth to justice, newly formed by its own refined conscience, by interpreting with simple logic, the truest intent and purpose of Kay V. Ehrler, 499 U.S. 432 (1991) and its implementing statute 42 U.S.C. sec. 1988, as applied to the qualified facts of this instant case, as discussed supra, for granting to Pro Se Plaintiff justifiable compensation for his considerable efforts and time, put forth in litigating this meritorious cause.

FINAL NOTES ON THE EVIDENCE:

The evidence utilized by the ALJ in making his final determination of 8/18/94, and identified by the ALJ as Exhibit # 22, herein at App. N, pages 61-64, is not only fabricated evidence, since it was made after the fact, and that which causes deception, but also defective evidence since Mamie Iannaccone's SSA claim number is incorrectly shown as 126-05-257**9** rather than correctly shown as 126-05-257**6,** for a cross-reference number for PETER SSA claim number 712-14-2693.

Also, ALJ'S Exhibit # 19, on the Administrative Record Transcript page 191, used by the District Court Judge in his final Decision of March 3, 2000, at App. F, page 31, and used by the SSA Commissioner in his brief in 00-6185, at App. AA, page 133, to contend without proof that PETER'S SSA application filed for him in Nov. 1976 was filed incorrectly, has equal weight in the classification of evidence as ALJ'S Exhibits #21, #22, and #23, as fabricated evidence, made after the fact, and which can not serve as the probative evidence to substitute for the Nov. 1976 SSA application made for PETER which Plaintiff has a statutory right of access to.

CONCLUSION

This Honorable Court must grant Plaintiff's Petition for a Writ of Certiorari to prevent further undue injustice in this most exceptional cause.

Respectfully submitted,

S/s William G. Iannaccone

William G. Iannaccone, pro se
Plaintiff in Interest &
Administrator & Co-Committee for the
Estate of PETER IANNACCONE
119 Ellen Drive
Cheektowaga, New York, 14225-1225
Telephone (716) 632 1608

S/s Eleanor Iannaccone

Eleanor Iannaccone
Proper Party Plaintiff as the
Co-Committee for the
Estate of PETER IANNACCONE

Dated: Buffalo, N.Y.
July , 2001

NOTE TO PROCESSING CENTER
FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF
William G. Iannaccone o/b/o

Peter W. Iannaccone (Deceased)
Claimant

CLAIM FOR
Widower's
Insurance Benefits

(Commencement of
Entitlement)

(XREF: 712 —14—2693)
Mamie Iannaccone 126—05-2576
(Wage Earner(Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The request was filed on behalf of Peter W. Iannaccone, (hereinafter referred to as "Peter") by his son and executor of his estate, William G. Iannaccone (hereinafter referred to as the "Claimant")

ISSUES

The general issue to be decided in this case is whether Peter W. Iannaccone was entitled to widower's insurance benefits on the social security account of Mamie Iannaccone (hereinafter referred to as "Mamie") for any month prior to October 1991. The specific issue is whether the application for widower's insurance benefits filed on behalf of Peter may be deemed to have been filed any earlier than the actual application date of April 12, 1992.

After careful consideration of the entire record and as explained below, the Administrative Law Judge concludes that Peter's application for widow's insurance benefits may be deemed to have been filed on January 25, 1984, but not prior thereto.

APPLICABLE LAW AND REGULATIONS

Section 202(f) of the Social Security Act, as pertinent here, provides for the payment of widower's insurance benefits to the widow of an individual who died fully insured if the widower has not remarried, has attained the age of 60, and has filed an application for such
benefits 126—05—2576

Section 202(j) (1) of the Act provides, as pertinent here in the case of an individual who is at least 65 years of age, that entitlement to widower's insurance benefits may commence up to six months prior to the date the application for benefits is filed, provided that all the requirements for entitlement (other than the filing of the application) were met at such earlier time.

Section 404.611 of the Social Security Administration Regulations (20 CFR 404.611) provides that an application for monthly benefits under Title II of the Act generally must be filed on a form provided for such purpose and signed by the applicant.

Section 404.612 of the Regulations (20 CFR 404.612) provides that the potentially entitled individual generally must sign the application for benefits. However, section 404.612(c) provides that where an individual is mentally incompetent the application may be signed by a court-appointed representative or by a person who is responsible for the care of the individual.

Section 404.614 of the Regulations (20 CFR 404.612) provides that an application is considered to have been "filed" when it is received at an office of the Social Security Administration or by an employee of the Administration who has been authorized to receive such application at a place other than such an office.

It has been a well—established principle of law (affirmed by the United States Supreme Court in the case of Schweiker v. Hansen, 450 U.S. 785 (1981); adopted by the Secretary in

Social Security Ruling 81—29c (C.E. 1981)) that the filing of a written application for social security benefits is a substantive requirement of the Social Security Act. Under the principle set forth in Hansen, even where an individual's delay in filing an application was due to misinformation from an Administration employee, the application can not be considered as filed any earlier than the date on which the written application was actually filed or, if earlier, the date on which the application may be deemed to have been filed under other applicable provisions of the Act and Regulations.

The somewhat strict rule under the Hansen case was modified by Congress in statutory amendments enacted in 1989 (P.L. 101-239, 12/19/89). Specifically, section 202(j) (5) of the Social Security Act now provides that in any case where it is determined to the satisfaction of the Secretary that an individual delayed in filing for monthly social security benefits due to misinformation from an employee of the Administration relating to such individual's eligibility for benefits, the individual shall be deemed to have applied for benefits as of the date on which the misinformation was provided or the date on which the individual met all the requirements for entitlement, whichever is later. The amended provisions of section202(j) (5) are applicable only with respect to misinformation provided after December 1982.

EVALUATION

The basic facts of this case are not substantially in dispute. Peter was born on March 2, 1911, and Mamie was born on March 30, 1918. They were married in 1938. The claimant reported that Peter served in the armed forces during World War II. Upon returning to civilian life in 1944, Peter apparently was suffering from a service—connected mental disorder of unspecified type. The claimant reported that Peter and Mamie were legally separated in 1944, but they never divorced. Peter was involuntarily confined to the Veterans Administration psychiatric facility at Canandaigua, New York, from 1944 to 1968 (or to 1975 according to other statements in the record)

In October 1976, Mamie filed an application for disability insurance benefits (Exhibit 23) . That application was granted and she became entitled to benefits in October 1976. Peter filed an application for retirement insurance benefits on his own social security account in November 1976, at age 65. However, his application was denied based on a determination

that he did not have sufficient covered earnings under social security to meet the insured status requirement necessary for entitlement to retirement benefits (Exhibits 21 and 22).

Mamie died on October 15, 1978. In February 1979, an application was filed for the lump sum death benefit on Mamie's social security account. Social security records show that the $255 lump sum death benefit was paid to Peter in March 1979 (Exhibit23)

Peter received a 100—percent service—connected disability pension from the Veterans Administration from 1944 until his death in 1992. In 1960, Peter was declared legally incompetent by a New York court, although no Committee was appointed for him at that time and Mamie apparently oversaw the management of his property and income until her death. Mamie's sister, "Marie," was the executrix of Mamie's estate. Although the record is somewhat vague on the point, the claimant indicated that Marie was able to exercise control over Peter's property and income after Mamie's death. In 1983 and 1984, the claimant raised allegations of misuse and embezzlement of Peter's funds by Marie and petitioned the court for appointment of a committee for Peter. In June 1984, Horace A. Gioia, Esq., was appointed by the court as the committee of the person and property of Peter.

As discussed below in greater detail, the claimant repeatedly contacted and visited Peter's local social security office at Amherst, New York, in 1983 and 1984 to inquire as to Peter's possible eligibility for social security benefits. He was informed at that time that Peter was not eligible for benefits because he did not have the necessary insured status (Exhibit12)

In October 1989, the court appointed the claimant and the Peter's niece, Eleanor Iannaccone, as co-committee for Peter. The claimant had petitioned for the change because of dissatisfaction with the previous committee (Exhibits 9 and 12). Peter died on April 20, 1992 (Exhibit 10) . The claimant was named as the executor of Peter's estate (Exhibit 25).

The claimant stated that as Peter's health deteriorated in 1992, he (the claimant) visited the Administration's Amherst office to inquire about Medicare eligibility for Peter. At that time, the claimant learned that Peter had been eligible to apply for widower's insurance benefits on Mamie's account for many years. On April 23, 1992, the claimant filed a written

application for widower's insurance benefits on behalf of Peter, who had died on April 20, 1992 (Exhibit 1)

In an initial determination dated August 16, 1992, the Administration granted Peter's application (Exhibit 6). However, pursuant to section 202(j) (1) of the Act, the Administration determined that Peter's entitlement to benefits could begin no earlier than October 1, 1991, six months prior to the month in which the April 1992 application was filed. The claimant requested reconsideration, asserting that Peter's entitlement should be retroactive to 1976, when he attained age 65. In a reconsidered determination, the Administration affirmed the previous determination that Peter's entitlement commenced in October 1991 (Exhibit 8). The claimant requested the hearing to appeal the reconsidered determination.

Hearings in this matter were held before the Administrative Law Judge on July 13, July 14 and July 15, 1993. Multiple hearings were held because the claimant asked the Administrative Law Judge to take testimony from several witnesses, who could not appear on the same date. The claimant and Eleanor Iannaccone appeared and testified in support of the claim. Also testifying at the claimant's request were: William F. McGurn, District Manager of the Amherst office, who had been involved in the claimant's contacts with that office in 1983 and 1984; and Paul Bogumil, Sr., a claims representative at the Amherst office, who was involved in the filing of the April 1992 application.

The record was held open for an extended time following the hearing as the claimant submitted multiple written memoranda and additional evidence, and to allow further inquiry and research by the Administrative Law Judge's staff.

In his many letters to the Administration, the claimant has alleged that Peter actually received social security benefits in the past and that Administration officials have intentionally mislead him regarding that purported fact. However, after comprehensive review of the immediate record and further inquiry into the social security histories of both Peter and Mamie, the Administrative Law Judge can find absolutely no evidence or reason to believe that Peter ever was entitled to benefits on any social security account, until the granting of the April 1992 application.

In appealing this matter, the claimant also has raised several issues which are not within the authority of the Administrative Law Judge to decide. The claimant alleged that Peter received improper medical treatment while confined to the Veteran's Hospital for many years. However, the Social Security Administration has no authority to act on any such complaints, and the claimant would have to raise those concerns with the Veterans Administration. The claimant's many letters to the different components of the Administration also have made allegations of misuse and/or embezzlement of Peter's funds by his sister—in—law and of malfeasance or nonfeasance by his prior committee and attorney. While these matters are undoubtedly of great concern to the claimant, the Social Security Administration has no jurisdiction to inquire into them as they do not involve the misuse of benefits paid under the Social Security Act and, in any event, have no direct bearing on the issue of Peter's retroactive entitlement to widower's insurance benefits. Any such misuse of other funds is a matter for local courts and or law enforcement authorities.

The primary issue for determination in this case is whether Peter's application for widower's insurance benefits may be deemed to have been "filed" at any time prior to April 23, 1992.

The claimant has asserted that Peter should be found entitled to widow's insurance benefits retroactive to the time he attained age 65, in 1976. Although Peter and Mamie each filed separate applications for benefits on their own social security accounts in 1976, neither sought benefits for Peter as Mamie's spouse. Even if such an application had been filed, Peter was financially supported by his own veteran's pension and was not actually dependent on Mamie, as would have been required under the law at that time for entitlement to benefits as Mamie's spouse. When the application for the lump sum death benefit was granted in March 1979, the notification of award would have included a so-called "blanket close out statement" informing Peter that he was not entitled to any other social security benefit on Mamie's account. In the absence of a timely appeal of that notice, the blanket denial became "final" and effectively precludes reopening, at this late date, of any supposed applications asserted to have been filed at that time or earlier (20 CFR 404.987 and 404.988).

The claimant's only reasonable avenue of establishing an earlier widower's insurance benefit application date is to show, under section 202(j) (5) of the Act, that an application for such

benefits would have been filed earlier had it not been for some misinformation provided by Administration personnel to Peter or those properly acting on his behalf. It must be noted that section 202(j) (5) is applicable only with respect to misinformation furnished after December 1982. Thus, even if there had been some type of cognizable misinformation in connection with the filing of the applications in 1976 and 1979, section 202(j) (5) can not be used to deem the filing of an application at those times. Further, under the principle set forth by the Hansen case, misinformation can not serve as the basis for deeming an earlier application where section 202(j) (5) does not apply.

The claimant makes a stronger case for the proposition that misinformation may have contributed to the failure to file an application for widower's insurance benefits during his contacts with the Administration in 1983 and 1984. There is much contemporaneous documentation establishing that the claimant did indeed contact the Administration's Amherst office on several occasions in 1983 and 1984, in regard to Peter's eligibility for social security benefits (Exhibit 12). In letters dated January 11, 1983, and February 2, 1983, the claimant notified the Administration of his belief that Peter was already receiving social security benefits and that such benefits were being misused by Peter's sister-in-law, Marie (Exhibit 12). In a response dated February 17, 1983, Mr. McGurn advised Peter that no social security benefits were being paid to Peter or on his account. In a letter dated January 4, 1984, the claimant again asked the Administration for verification of Peter's receipt of benefits. The claimant noted in the letter that Peter's wife Mamie was deceased and provided the correct social security numbers for Peter and Mamie as well as several incorrect numbers which each may have used. In an undated response, Mr. McGurn informed Peter that a thorough check of the records had failed to show that he was receiving any type of social security benefit, under any of the account numbers which had been provided by the claimant. In another letter dated February 7, 1984, the claimant provided information as to bank accounts held in the names of Peter and/or Mamie and again requested information regarding Peter's alleged receipt of benefits. In a response dated February 8, 1984, addressed directly to the claimant, Mr. McGurn advised that a thorough investigation had been made and that no further information could or would be provided to him regarding Peter' s entitlement.

The record also contains a copy of a letter dated May 10, 1984, in which the claimant requested that Peter's lawyer inquire as to Peter's eligibility for social security benefits, citing both Peter's and Mamie's social security numbers (Exhibit 27). A "report of confidential social security benefit information", addressed to Peter's sister-in—law and dated May 24, 1984, advised that no social security benefits were being paid to Peter because he had insufficient covered work to be eligible for such benefits (Exhibit 34). That report indicates that Peter's sister-in-law (or Peter's lawyer acting on her behalf) had made an inquiry as requested by the claimant.

Although the claimant has alleged that he was "turned away" and not allowed to file an application when he contacted the Administration in 1983 and 1984, the record fails to show such action or behavior by the Administration personnel with whom he dealt at that time. Indeed, in response to one of the claimant's inquiries, Mr. McGurn advised that an application could be filed if it was believed that Peter was eligible for benefits (Exhibit 12, p. 15). Moreover, the claimant's several letters to the Administration did not indicate that he wished to file an application for widower's insurance benefits, but requested clarification of his (incorrect) belief that Peter already was entitled to benefits on his own social security account.

In any event, the question under section 202(j) (5) of the Act is not whether an application was refused, but whether the filing of an application on Peter's behalf was prevented or discouraged by misinformation" from Administration personnel. What constitutes misinformation depends upon all the circumstances known at the time. The claimant contends that the failure of the Administration personnel to inform him of Peter's eligibility for benefits on Mamie's account constituted misinformation. With the benefit of hindsight, it is clear that Peter could have become entitled to widower's insurance benefits on Mamie's social security account if an application had been filed at the time. Unfortunately, as indicated above, the attention of the responding Administration personnel was diverted from the Possibility of Peter's entitlement on Mamie's account by the persisting emphasis which Peter's representatives placed on determining whether he was actually receiving benefits on his own account. Nonetheless, under the Administration's standard procedures, an inquiry by or on behalf of a widowed individual of retirement age regarding possible entitlement to social

security benefits should prompt Administration personnel to investigate the possibility of entitlement on both the individual's own account and the deceased spouse's account. In his dealings with the Administration, the claimant first specifically mentioned Mamie and the fact that Peter was widowed in his letter of January 25, 1984. At that point, the available information reasonably should have prompted the Administration personnel to ascertain that Peter was eligible to apply for benefits on Mamie's account and to so inform Peter or those acting on his behalf. Thus, while it would be unfair to assign blame either to the Administration employees or to those acting on behalf of Peter, the circumstances in this case warrant an equitable conclusion that, under section 202(j) (5) of the Act, Peter's application for widower's insurance benefits should be deemed to have been "filed" as of the date of the claimant's January 25, 1984 letter.

As indicated above, the claimant contacted the Amherst social security office in 1992 in an effort to obtain Medicare coverage for Peter. The claimant has disagreed with the extent to which Medicare coverage has been allowed. However, there has been no reconsidered determination specifically addressing when Peter first became eligible for Medicare coverage. Therefore, that is not an issue which the Administrative Law Judge may decide at this time. However, the Administration will further consider the question of when Peter may be deemed to have enrolled in Medicare, based on the determination made herein as to the effective date of his application for widower's insurance benefits, and advise the claimant as to any changes in such Medicare coverage.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. Peter Iannaccone was born on March 2, 1911, and died on April:20, 1992; he was the widower of Mamie Iannaccone, who died fully insured on October 15, 1978.

2. Peter was awarded widower's insurance benefits on Mamie's social security account, based on an application filed on April 23, 1992, with entitlement commencing in October 1991.

3. The claimant (Peter's son) contacted the Administration on several occasions in 1983 and 1984 in regard to Peter's possible entitlement to social security benefits on his own account; the claimant first mentioned Mamie and that Peter was widowed in a letter dated January 25, 1984.

4. Administration personnel first reasonably should have ascertained and informed Peter or his representatives that he was eligible to apply for benefits on Mamie's account on or about January 25, 1984.

5. Peter's application for widower's insurance benefits may be deemed to have been filed on January 25, 1984, pursuant to section 202(j) (5) of the Social Security Act.

It is the decision of the Administrative Law Judge that Peter Iannaccone's application for widower's insurance benefits on the social security account of Mamie Iannaccone shall be deemed to have been filed on January 25, 1984. The Social Security Administration will redetermine the past-due benefits to which Peter was entitled at the time of his death and make appropriate payment in accordance with the Social Security Act.

The Social Security Administration will also determine the effect that this decision has on Peter's eligibility for Medicare coverage and inform the claimant of any pertinent changes in such Medicare coverage.

s/s F. Lambert Haley
300 Pearl St., 4 Floor
Buffalo, New York 14202

Date: August 18, 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED
96 NOV, 14

ESTATE OF PETER IANNACCONE
by WILLIAM G. IANNACCONE,
ADMINISTRATOR and CLAIMANT, pro se,
Plaintiff

ORDER
95 -CV-555 (S)

v

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY, and MARIE LAW, Former "Custodian" of SSA Funds Payable for
PETER IANNACCONE,
Defendants

Whereas, by Order dated June 4, 1996, this Court stayed Plaintiff's Motion for Enlargement of Time to file Plaintiffs response to Defendant Commissioner of Social Security's Motion for Judgment on the Pleadings pending a determination by this Court of the Plaintiffs right to proceed pro se in a fiduciary or representational capacity, and

Whereas, N.Y. McKinney's Judiciary Law § 478 provides: "It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state without having first been duly and regularly licensed and admitted to practice law in the courts of

1. Pursuant to Pub. Law No. 103-296 which transferred to the function of the Secretary of Health and Human Services in Social Security cases to the Commissioner of Social Security effective March 31, 1995, the Commissioner of Social Security has been substituted for the Secretary of Health and Human Services in this action.

record of this state, and without having taken the constitutional oath," and

Whereas, this Court determines that an estate cannot by it nature represent itself and, therefore, must be represented by a licensed attorney, despite the Plaintiff-administrator's fiduciary capacity and relation to the decedent,

IT HEREBY IS ORDERED, that Plaintiff-administrator shall obtain counsel to represent the estate in the above-captioned action on or before January *15*, 1997.

FURTHER, should Plaintiff-administrator fail to obtain counsel by this date, Plaintiffs complaint will be dismissed without prejudice and the C1erk of the Court shall at that time take whatever other actions are necessary to close this case; however, Plaintiff may, subject to the statute of limitations, file this action again whenever an attorney is prepared to present the estate's case.

SO ORDERED.

Dated: November 14, 1996
Buffalo, New York

S/s William M. Skretny
United St ates District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ESTATE OF PETER IANNACCONE, Deceased,
by WILLIAM G. IANNACCONE,
ADMINISTRATOR and CLAIMANT, pro se

Plaintiff,

V.

FILED
97 JAN 23

SHIRLEY S. CHATER, COMMISSIONER
OF SOCIAL SECURITY, And MARIE LAW,
Former "Custodian" of SSA Funds Payable for
PETER IANNACCONE,

Defendants.

Whereas, by Order dated November 14, 1996, this Court ordered Plaintiff- administrator to obtain counsel to represent the estate in the above-captioned action on or before January 15, 1997, and

Whereas, Plaintiff-administrator has failed to obtain counsel by January 15,1997, and

Whereas, Plaintiff-administrator has failed to show good cause for an enlargement of time for compliance with the November 14,1996 Order,

IT HEREBY IS ORDERED, that Plaintiff-administrator's Motion for an Enlargement of Time for Conclusion of Compliance to Order Issued November 14, 1996 is DENIED.

FURTHER, that Plaintiff's Complaint is dismissed without prejudice and the Clerk of the Court shall take whatever other actions arc necessary to close this case; however, Plaintiff may, subject to the statute *of* limitations, file this action again whenever an attorney is prepared to present the estate's case.

SO ORDERED.

s/s William M. Skretny
United States District

Dated; January 23, 1997
Buffalo, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ESTATE OF PETER IANNACCONE, DECEASED.
BY WILLIAM G. IANNACCONE ADMINISTRATOR
AND CLAIMANT, pro se.
Plaintiff

V.

JUDGMENT IN A CIVLL CASE
95-CV-555 (S)

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY, and MARIE LAW, former "Custodian" of SSA FUNDS PAYABLE FOR PETER IANNACCONE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to be heard before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's complaint is dismissed without prejudice.

FILED
97 JAN 24

DATE JAN 24, 97
RODNEY C. EARLY
By Deputy Clerk s/s (initials)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997
(Submitted October 30, 1997Decided April 27, 1998)

Docket No. *97-6045*

WILLIAM G. IANNACCONE, Estate of Peter Iannaccone, Deceased, by William G. Iannaccone, Administrator and Claimant,

Plaintiff- Counter-Defendant-Appellant,

—V.—

MARIE LAW, Former "Custodian" of SSA Funds payable for Peter Iannaccone,
Defendant- Counter- Claimant -Appellee,

JOHN J. CALLAHAN,
Acting Commissioner of Social Security,

Defendant-Appellee.

Before

CARDAMONE, WALKER, and JACOBS,
Circuit Judges

William G. Iannaccone, plaintiff, *pro Se*, appeals from an order dated January 23, 1997 of the United States District Court for the Western District of New York (Skretny, J.), dismissing a social security benefits action brought by plaintiff Iannaccone as the administrator of a decedent's estate for plaintiff's failure to obtain counsel to represent the estate.

Affirmed, in part, reversed, in part, and remanded.

WILLIAM G. IANNACCONE, Cheektowaga, New York, *pro se, for Plaintiff-Counter-Defendant-Appellant.*

SANDRA M. GROSSFELD, Assistant Regional Counsel, New York, New York (Barbara L. Spivak, Chief Counsel, Region II, Arthur J. Fried, General Counsel, Office of the General Counsel, Social Security Administration, New York, New York; Patrick H. NeMoyer, United States Attorney, Western District of New York, Buffalo, New York, of counsel), *for Defendant-Appellee Commissioner of Social Security.*

JOHN RICHARD STREB, Kenmore, New York, *for Defendant- Counter- Claimant -Appellee Marie Law.*

CARDAMONE, *Circuit Judge:*

This appeal is from a January 23, 1997 order of the United States District Court for the Western District of New York (Skretny, J.), dismissing without prejudice an action brought by plaintiff William G. Iannaccone, appearing *pro Se,* as administrator of his father's, Peter Iannaccone's, estate. The action consists of two claims. The first claim seeks judicial review of a final decision of the Commissioner of the Social Security Administration (Commissioner) that denied social security benefits to which plaintiff claims his father was entitled during his lifetime. The second claim seeks damages from Marie Law, who was a custodian of the deceased, for her alleged conversion of the decedent's social security checks.

The district court dismissed both claims because the plaintiff administrator, a non-lawyer, purported to provide legal representation for the decedent's estate. The issue before us on this appeal is whether plaintiff may appear *pro se* with respect to both claims. Because the answer regarding each claim is different, it will be helpful to the explanation to examine the subject of *pro se* representation in civil actions.

BACKGROUND

A. *Family History*

We turn first to the facts. William G. Iannaccone, the *pro se* plaintiff and appellant in this case, is the sole surviving child of Peter and Mamie Iannaccone. The father, Peter, was born on March 2, 1911 and the mother, Mamie, was born on March 30, 1918. They were married in 1938. The father served in the armed forces of the United States during World War II and returned to civilian life in 1944 with a service-connected mental disorder disability. The couple separated that year, but never divorced. As a result of his disability, Peter Iannaccone was involuntarily confined to a Veterans Administration psychiatric hospital in Canandaigua, New York.

In October 1976, Mamie filed an application for disability insurance benefits, which was granted. Peter filed an application for retirement insurance benefits on his own social security account in November 1976, at age 65. His application was denied based on a determination that he did not have sufficient covered quarters of earnings under the law to meet the insured status requirement necessary to be entitled to retirement benefits.,

B. *Administrative Proceedings*

Mamie Iannaccone died on October 15, 1978. After her death, an application was filed in February 1979 for the lump sum death benefit on her social security account. Social security records show that a $255 lump sum death benefit was paid to her husband in March 1979.

After Peter's death on April 20, 1992, William Iannaccone, the 46-year-old plaintiff, was granted letters of administration upon his father's estate on November 5, 1992.
On April 23, 1992 plaintiff, as administrator of father's estate, filed a

claim with the Commissioner for amounts due his father as widower's insurance benefits on Mamie's account. The Commissioner approved payment of benefits to plaintiff on August 16, 1992, but only with respect to benefits owed for the six months immediately preceding the April 1992 application. Plaintiff requested reconsideration of the matter, asserting that his father's entitlement should be retroactive to 1976, when he attained age 65 and became eligible to receive those benefits. The administrative law judge (ALJ) conducted a hearing, considered the case *de novo* and, on August 18, 1994, deemed decedent to have filed an application for widower's insurance benefits on January 25, 1984. Accordingly, the ALJ directed the agency to redetermine the past-due benefits to which he was entitled. The decision of the ALJ became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on May 9, 1995. Plaintiff then sought review of the Commissioner's order in the district court.

C. *Judicial Proceedings*

Peter Iannaccone received a 100 percent lifetime service-connected disability pension from the Veteran's Administration beginning in 1944. In 1960 a New York court declared him legally incompetent. Although no committee was appointed for him at that time, his wife apparently oversaw the management of his property and income until her death in 1978. Mamie Iannaccone's sister, Marie Law, was named the executrix of Mamie's estate. Plaintiff alleges that Marie Law thereafter exercised control over plaintiff's father's property and income. In 1983 and 1984 plaintiff claimed Mamie Law misused and embezzled Peter's funds, and he therefore petitioned the court for appointment of a committee for his father. In June 1984 the court appointed a committee of the person and property of Peter Iannaccone.

In July 1995 plaintiff filed a complaint in the district court seeking damages from Marie Law, decedent's sister-in-law, for alleged conversion of social security benefits payments made to decedent. In that same complaint, plaintiff also sought review of the Commissioner's order, as discussed above.

By order dated November 14, 1996 the district court ruled that pursuant to N.Y. Jud. Law § 478 (McKinney's 1983), a natural person cannot appear for a person other than himself in a court of record without having been admitted to the practice of law. The district court judge stayed the action and *sua sponte* ordered plaintiff to obtain counsel to represent the estate in the action before January 15, 1997. The order also provided that, should plaintiff fail to obtain counsel, his complaint would be dismissed without prejudice, so that plaintiff could refile the action again whenever an attorney was prepared to present the estate's case. When plaintiff failed to obtain counsel, the district court, by order dated January 23, 1997, dismissed the case without prejudice. A judgment was entered accordingly on January 24, 1997. This appeal followed.

DISCUSSION

A. *Right of Self-Representation Generally*

Before turning to the merits of whether plaintiff is entitled to appear *pro se* in this civil proceeding, we think it helpful to discuss the general right of self-representation. The right to proceed *pro se* in civil actions in federal courts is guaranteed by 28 U.S.C. § 1654, which provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Section 1654's guarantee derives directly from the Judiciary Act of 1789. First introduced in the Senate on June 12, 1789 as part of Senate Bill [S-1], the right to self-representation appeared in section 31 of the Bill. But when the Bill became law, on September 24, 1789, the right was moved to section 35, which reads as follows: "That in all the Courts of the United States the Parties may plead and manage their own causes personally or by the assistance of such Counsel or Attornies at law as by the rules of the said Courts respectively shall be permitted to manage and conduct causes

therein." V *Documentary History of the First Federal Congress of the United States of America 1789-1791* 1150, 1165, 1193 (1986). As can be seen, the right to self-representation has remained constant for over 200 years.

The framers of our Constitution thought self-representation in civil suits was a basic right that belongs to a free people. Although the Supreme Court alluded to civil *pro se* representation in Faretta v. California, 422 U.S. 806, 812-13 *(1975)*, the Court there focused its discussion on the right to represent oneself as a defendant in a criminal case, *id.* at 813 *et seq.*, which the Constitution's Bill of Rights guarantees. In a criminal prosecution, a *pro se* party of course may only appear as a defendant. In a civil case, a person may appear *pro se* as either a plaintiff or defendant. And, as noted, the right of self-representation in one case is protected by the Constitution, and in the other, simply by statute. Further, in contrast to criminal defendants, civil litigants unable to afford counsel cannot ordinarily obtain appointment of counsel, except in circumstances when there is a risk of loss of liberty, as in mental commitment or juvenile delinquency proceedings. *See* H.B. Kim, Note, *Legal Education For the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 Yale L. 1. 1641, 1646-47 (1987).

Moreover, the historical origins of self-representation in civil and criminal proceedings are different. In *Faretta* the Court discussed the historic requirement of having counsel, going back to the infamous English Star Chamber that forced counsel upon an unwilling defendant in a criminal proceeding, and the requirement's gradual reform. This reform was fervently embraced in colonial America for those accused of crime. *See* Faretta, 422 U.S. at 82 1-26.

B. *History of Self-Representation in Civil Litigation*

Passing from the criminal to the civil context, we begin by observing that a person appearing *pro se* in federal court can

be a mixed blessing because persons appearing *pro se* lack legal training and may, on occasion, burden the court by filing illogical or incomprehensible pleadings, affidavits and briefs. And sometimes a *pro se* litigant appears simply for the purpose of using the courtroom to advance a political or social agenda, or to pursue a matter that is legally unredressable. *See* E.J.R. Nichols, Note, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 Tex. L. Rev. 351, 351 nn.2 & 3 (1988). Yet, even given those potential burdens, there still remains a citizen's right of access to the courts, a strongly held notion stretching back to the beginnings of our Republic. The origins of the right to appear for oneself in civil proceedings derive from a number of sources, all deeply rooted in our history and culture. We undertake to discuss briefly five of those sources, though doubtless there are others.

First, history. Under the English common law with its complicated forms of action and veritable maze of writs and confusing procedures, the right to retain counsel in civil proceedings became a necessity. By the middle of the thirteenth century, lawyers so monopolized the courts in London that the King was forced to decree that, except for a few special causes, litigants were entitled to plead their own cases without lawyers. *See* Note, *The Right to Counsel in Civil Litigation*, 66 Colum. L. Rev. 1322, 1325 (1966).

Second, mistrust of lawyers made appearance in court without benefit of counsel the preferred course. *See* A.L. Downey, Note, *Fools and Their Ethics: The Professional Responsibility of Pro Se Attorneys*, 34 B.C. L. Rev. 529, 533 (1993). Lawyers had no position of honor or place in society in early colonial days. The pioneers who cleared the wilderness looked down upon them. For example, the Massachusetts Body of Liberties of 1641 expressly permitted every litigant to plead his own cause and provided, if forced to employ counsel, the litigant would pay counsel no fee for his services. *See* Charles A. & Mary R. Beard, *The Rise of American Civilization* 100-01 (College ed. 1930).

Third, informality. In early colonial days, the rule of informality was a necessity in court proceedings since most presiding judges were not lawyers. *See The Right to Counsel in Civil Litigation, supra,* at 1328. By the time of the Revolution, legal proceedings had become more technical and reliance on precedent had evolved, both of which required people trained in legal interpretation. As the decades of the 18th century passed, legal questions became more complex and the need for skilled attorneys was recognized. Enough individuals had gone into law so that by the time the First Continental Congress commenced, 24 of the 45 delegates were lawyers, and in the Constitutional Convention, 33 of the 55 members were lawyers. *See* Beard, *supra,* at 101. Nonetheless, the number of lawyers although growing was still few, many judges were still laymen, and the legal process still remained sufficiently simple to permit persons whether rich or poor to plead their own causes. *See The Right to Counsel in Civil Litigation, supra,* at 1329.

Fourth was religion. Colonial peoples' notions of their own individual rights and their reliance on themselves were part of the movement away from religious authority and towards religious freedom. Thus, for example, the Massachusetts Bay Colony spawned dissenters such as Anne Hutchinson and Roger Williams who, declaring that the colony's leaders had not followed the pilgrims' heritage, left and obtained a charter for Providence, Rhode Island, in 1663, where they preached that every person should be allowed to follow his own conscience in matters of religion. Connecticut, Rhode Island, and the Massachusetts Bay Colony which formed the heart of New England Puritanism were part of a religious heritage characterized by a prickly independence and stubborn self reliance. *See* 1 Page Smith, *A New Age Now Begins: A People's History of the American Revolution* 22-23 (1976).

Fifth, education and literacy of colonial Americans. During the 1700s most citizens were literate and nearly everyone read

a newspaper. There were numerous libraries and book-shops in Boston, Philadelphia, and New York by the time of the Revolution. *See* Bensen Bobrick, *Angel in the Whirlwind: The Triumph of the American Revolution* 47-48 (1997). This broad literacy and the people's political involvement in their democratic institutions transformed the average American into a citizen-lawyer. *See id.* at 49.

From all these various strands and perhaps others as well evolved the notion, perhaps best expressed by Thomas Paine, arguing in 1777 for a Pennsylvania Declaration of Rights, who said that to plead one's cause was "a natural right," pleading through counsel was merely an "appendage" to the natural right of self-representation. *See* Faretta, 422 U.S. at 830 n.39.

C. *Qualifications on the Right*

Having explained the breadth of the right, we note some qualifications that have been placed upon it. First, the right to self-representation must be timely asserted, preferably before trial. *See O'Reilly v. New York Times Co.*, 692 F.2d 863, 867-68 (2d Cir. 1982). Second, a party seeking to assert his statutory right to self-representation must clearly and unequivocally discharge any lawyer previously retained. A party does not have a right to self-representation and representation by counsel at the same time. *See Id.; United States v. Mitchell*, 137 F.2d 1006, 1010-11 (2d Cir. 1943).

Third, and key to this appeal, because *pro se* means to appear for one's self, a person may not appear on another person's behalf in the other's cause. A person must be litigating an interest personal to him. *See Pridgen v. Andresen*, 113 F.3d 391, 393 (2d Cir. 1997). For example, a lay person may not represent a corporation or a partnership or appear on behalf of his or her own minor child, *see id.*; Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990). Thus, the threshold question becomes whether a given matter is plaintiff's own case or one that belongs to another. *See* Phillips v. Tobin, 548 F.2d 408, 411 (2d Cir. 1976) ("The

basic question raised by [28 U.S.C. § *1654]* is whether this stockholder's derivative suit is the plaintiff's 'own case' or is a suit belonging to the corporation."). To that question, we focus our attention in resolving the issues presented on this appeal.

II The Merits

A. *The Conversion Claim*

With the origins of the right and its limitations and conditions in mind, we pass to the merits. To begin with, we are not persuaded by plaintiff's argument that because he was permitted to proceed *pro se* before the Commissioner and was consistently recognized by the Commissioner as the "SSA Claimant/Estate's Non-attorney Representative" at every stage of the administrative proceedings, he should be allowed to proceed *pro se* in the district court under 42 U.S.C. §~ *405(g)* & 406(a). Section 406(a) of Title 42, which permits non-attorneys to represent claimants, applies only to administrative proceedings before the Commissioner. Section 406, which is entitled "Representation of claimants before Commissioner of Social Security," states in relevant part:

> The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants *before the Commissioner of Social Security*. .

42 U.S.C. § 406(a)(l) (emphasis added). The plain language of the statute indicates that Congress only authorized the Commissioner to recognize non-attorneys representing claimants in proceedings held before the Commissioner. There is no parallel provision in the Act authorizing the Commissioner to permit non-attorney representation of claimants in proceedings before the courts.

Further, § *405(g),* which establishes procedures for judicial review of the Commissioner's final decision, provides in

relevant part:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice . .

42 U.S.C. § 405(g). This statutory provision does not address the specific procedural issue of whether a claimant may proceed *pro se* but simply grants a claimant the right to appeal a final decision of the Commissioner, as plaintiff has done here.

We agree with the district court's dismissal of plaintiff's claim, on behalf of Peter's estate against Marie Law, because clearly plaintiff was purporting to represent the estate in litigating an interest specific to the estate, that is, whether Law misappropriated social security benefits payments intended for Peter Iannaccone when he was living. In *Pridgen* we held that a representative of an estate may not proceed *pro se* in an action by the estate where the estate has beneficiaries or creditors other than the representative. 113 F.3d at 393. Under such circumstances, an action cannot be described as the litigant's own, because the personal interests of the estate, other survivors, and possible creditors, as here, will be affected by the outcome of the proceedings. A non-lawyer representative therefore would be litigating claims that are not personal to him. Because plaintiff admitted in his brief that there are creditors of the estate, *i.e.*, the physicians who treated his father prior to his death, the rule we have adopted applies to his claim against Marie Law brought in his capacity as administrator of the estate and the district court properly dismissed it.

B. *TheUnderpayment Claim Against the Commissioner*

While plaintiff, as the administrator of the estate, does not have the right to proceed *pro se* with the estate's claim against Law, he, as the sole surviving child of the deceased

beneficiary, has the statutory right to proceed *pro se* with his underpayment claim against the Commissioner. The record shows that this case was brought originally before the Commissioner by plaintiff pursuant to 42 U.S.C. § 404(d) for underpayment of social security benefits that were due his deceased father.

Section 404(d) and its implementing regulation, 20 C.F.R.§ 404.503, authorize distribution of underpayment by the Commissioner to certain individuals according to an established order of priority when the eligible beneficiary dies before the payment due is made. The deceased beneficiary's surviving spouse is the first person on the priority list, the spouse is then followed by the child or children of the deceased beneficiary. The seventh and last individual in the statutory order of priority is the legal representative of the estate of the deceased beneficiary. But the estate is not entitled to receive the benefits unless there is no individual who falls under any of the preceding categories of eligible claimants. *See* 42 U.S.C. § 404(d); 20 C.F.R. § 404.503.

Peter Iannaccone's wife Mamie predeceased him. Plaintiff, as decedent's sole surviving child, and not the estate, is the only claimant entitled to receive the underpayment by the Commissioner that was due Peter Iannaccone, the deceased beneficiary. Although the pleadings filed in the district court indicate that this was an action brought by "the Estate of Peter Iannaccone, by William Iannaccone, Administrator and Claimant," this claim was actually brought by plaintiff on his own behalf involving an interest personal to him because he is the only one entitled to receive the disputed underpayment under the Act. *Cf. Cheung*, 906 F.2d at 60 (finding that case was brought on behalf of the father's minor daughter under various civil rights statutes, even though the complaint was solely in the father's name, and holding that father could not bring the case *pro se*).

Indeed, the Commissioner concedes in his brief that "plaintiff's role in the administrative proceedings was that of a party

in interest, rather than that of a non-attorney representative." The record also shows that when the Commissioner approved plaintiff's application for amounts due his father, it sent a notification letter to plaintiff in May 1992, which stated that "[y]ou will soon receive a check for $4814.00 because we owed money to Peter Iannaccone deceased." The action commenced in the district court sought review of the Commissioner's final decision and involved essentially the same claim for underpayment that plaintiff litigated in the administrative proceedings below. Therefore, the action in the district court should have been deemed plaintiff's own case and not a suit belonging to the estate of plaintiff's father.

Unlike the estate's claim against Marie Law, where the interest of the estate was being litigated, here it is only plaintiff's own interest being litigated because the estate and its creditors are not entitled to the amount of underpayment in dispute. No other person's interests will be affected by the outcome of the proceedings. Hence, the fact that the estate has outside creditors in this case is irrelevant in determining whether plaintiff himself may proceed *pro se* in his own claim against the Commissioner in the district court.

Having decided that plaintiff may properly appear on his own behalf without counsel in this proceeding, we decline to address plaintiff's arguments regarding the merits, including the failure of the ALJ to fully develop the record and the issue of whether Law was a proper defendant in this case, because these issues are not properly before us.

CONCLUSION

Accordingly, for the reasons stated, we reverse the district court's judgment insofar as it dismissed plaintiff's *pro se* claim against the Commissioner, and remand that case for further proceedings in the district court where plaintiff may plead and conduct his own case personally; and, affirm the judgment insofar as it dismissed plaintiff's action against defendant Law as violative of N.Y. Judiciary Law § 478, because plaintiff is a non-lawyer.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

WILLIAM G. IANNACCONE,
Plaintiff,

V. DECISION AND ORDER
95-CV-555 (S)

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,
Defendant.

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INTRODUCTION

Before this Court is Defendant's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).[1] Also before this Court are the following motions filed by Plaintiff: (1) motion for delayed service of process; (2) motion for nonaffirmance of the commissioner's determination;[2] (3) motion for acceptance of corrections to the administrative record; (4) July 8, 1 998 motion for acceptance of supplementation of the record; (5) July 9, 1998 motion for acceptance of supplementation of the record; (6) motion to deem the primary issue to be joined with combined motion for formal discovery; (7) motion to perfect the record.

1 In support of its motion for judgment on the pleadings (Doc. No. 19), Defendant has submitted a memorandum of law (Doc. No. 20), a supplemental memorandum of law (Doc. No. 27). In opposition to Defendant's motion, Plaintiff has submitted a memorandum (Doe. No. 33) and an opposition "motion" (Doe. No. 37). In support of his various motions (Doe. Nos. 1 5, 36, 37, 46, 47, 48, and 54, respectively), listed supra, Plaintiff has submitted a supplemental affidavit (Doe. No. 52) and a memorandum (Doe. No. 57). In opposition to Plaintiff's motions, Defendant has submitted a memorandum filed August 3, 1998 (Doc. No. 49), a memorandum filed August 31, 1998 (Doe. No. 51), and a memorandum filed February 24, 1999 (Doe. No. 56).

[2]While this submission is loosely called a "motion", it is really Plaintiff's response to Defendant's motion.

Plaintiff filed his Complaint in this action on July 11, 1995 seeking judicial review of a final decision of the Commissioner of the Social Security Administration ("SSA") that denied social security benefits to which Plaintiff claims his father was entitled during his lifetime, as well as damages from Marie Law, who was a custodian of the deceased, for her alleged conversion of the decedent's social security checks. This Court held a hearing on the outstanding motions before this Court on September 16, 1 998 and reserved decision at that time.

For the reasons set forth below, this Court will grant Defendant's motion and deny Plaintiff's motions.

BACKGROUND

Plaintiff filed an application for widower's benefits due to his deceased father on April 23, 1992. The application was approved, but authorized payment of benefits only since October 1991, six months prior to the date of the application. This determination was affirmed on reconsideration. Plaintiff then requested a hearing, which was held on July 13, 1993, July 14, 1993, and July 15, 1993. The administrative law-judge ("ALJ"), before whom Plaintiff appeared, considered the case de novo and, on August 18, 1994, found that Peter lannaccone ("Peter") was deemed to have filed an application on January 25, 1984, but no earlier than that date, and directed the agency to redetermine the past-due benefits to which he was entitled. The decision of the ALJ became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review on May 9, 1 995. This action followed.

By order dated November 14, 1996, this Court ruled that pursuant to N.Y. Judiciary Law § 478, a natural person cannot appear for a person other than himself in a court of record without having been admitted to the practice of law. Therefore, this Court stayed this action and ordered Plaintiff to obtain counsel to represent the Estate of Peter Iannaccone ("the Estate") in this action before January 15, 1997. This order provided that, should Plaintiff fail to obtain counsel, his complaint would be dismissed without prejudice, so that he

could refile the action again whenever an attorney was prepared to present the Estate's case. When Plaintiff failed to obtain counsel, this Court, by order dated January 23, 1 997, dismissed the case without prejudice. A judgment was entered accordingly on January 24,
1997 from which Plaintiff appealed.
On appeal, the Second Circuit affirmed this Court's January 23, 1 997 order to the extent that it dismissed Plaintiff's action against Marie Law as violative of N.Y. Judiciary Law § 478 based upon Plaintiff's status as a non-lawyer. See lannaccone v. Law, 142 F.3d 553, 560 (2d Cir. 1998). Specifically, the court stated as follows:

"We agree with the district court's dismissal of plaintiff's claim, on behalf of Peter's estate against Marie Law, because clearly plaintiff was purporting to represent the estate in litigating an interest specific to the estate, that is, whether Law misappropriated social security benefits payments intended for Peter lannaccone when he was living." Id at 559. The court stated that while Plaintiff may have been able to represent the Estate before the Commissioner, he did not have a analogous right of representation in a district court. Id. ("There is no parallel provision in the Act authorizing the Commissioner to permit non-attorney representation of claimants in proceedings before the courts"). As a result, the conversion claim against Marie Law is no longer a part of this case.[3]

However, the court also found that even though Plaintiff brought the claim for underpayment against the Commissioner on behalf of the Estate, this Court should have substituted Plaintiff for the Estate and deemed the claim as his and not as belonging to the Estate. Id. at 560 ("Unlike the estate's claim against Marie Law, where the interest of the estate was being litigated, . . . [Plaintiff's underpayment claim against the Commissioner is only plaintiff's own interest being litigated because the estate and its creditors are not entitled to the amount of underpayment in dispute"). Therefore, the court reversed this Court's January 23,
1997 order to the extent that it dismissed Plaintiff's pro se underpayment claim against the Commissioner and remanded for consideration of that claim on the merits.

3 Plaintiff makes much of the fact that the court did not reach the merits of either the claim against Marie Law, i.e. whether she would have been a proper defendant in this case had this claim not been dismissed, or the merits of his underpayment claim against the Commissioner. Iannaccone v. Law, 142 F.3d at 560 ("Having decided that plaintiff may properly appear on his own behalf without counsel in this proceeding, we decline to address plaintiff's arguments regarding the merits, including the failure of the AL.J to fully develop the record and the issue of whether Law was a proper defendant in this case, because these issues are not properly before us" (emphasis added). From this, Pla intiff mistakenly concludes that he may still proceed against Marie Law The issue before the Second Circuit was Plaintiff's right to proceed pro se in this case. There was no reason why the court should have reached the merits, especially since it ruled th at he may not proceed pro se against Marie Law. That is, whether or not Marie Law would have been a proper defendant was made moot by the fact that that claim was no longer extant. Id. at 560 ("we affirm the judgment insofar as it dismissed plaintiff's action against defendant Law"). This case has only been remanded for consideration on the merits of Plaintiff's pro se claim against the Commissioner—this is the only claim that is properly before this Court.

FACTS

Peter Iannaccone was born on March 2, 1911 and Mamie lannaccone was born on March 30, 1918 (Tr. 115, 191) 4 They were married in 1938 (Tr. 57). They were separated in 1944, but did not divorce (Tr. 57, 59). Peter was confined to the Veteran's Administration psychiatric facility from 1944 to 1968 (Tr. 60). He was declared incompetent in 1960, but no committee was appointed for him at the time (Tr. 41, 60). He received VA benefits since 1945 (Tr. 120).

Mamie filed an application for disability insurance benefits and was found to be entitled to such benefits as of October 1976 (Tr. 198). Peter filed an application for retirement insurance benefits on his own account in November 1976 when he reached the age of sixty-five (Tr. 191). However, he did not have sufficient quarters of coverage to meet the insured status requirement for entitlement to retirement benefits (Tr. 194, 195, see Tr. 46). Mamie died on October 15, 1978 (Tr. 36, 119, 198). In February 1979, an application was filed for the lump-sum death benefit on Mamie's account (Tr. 98, 99). The lump sum death benefit was paid to Peter in March 1979 (Tr. 199).

"References preceded by 'Tr' are to page numbers of the transcript of the administrative record, filed by defendant as part of the answer to the complaint. See Doc. No. 18.

Plaintiff testified that, in 1983 and 1984, he visited the Social Security Administration and inquired as to what benefits Peter could receive. According to Plaintiff, he was told that Peter was receiving Veteran's benefits and was turned away (Tr. 123). Further, on January 11 and February 2, 1983 Plaintiff, apparently under the impression that Peter was receiving Social Security benefits, wrote to the Social Security office at Amherst, New York because he believed that Peter's Social Security benefits were being misused (Tr. 155, 156-57). William McGurn, the SSA district manager, informed Plaintiff on February 17, 1983 that there were no social security benefits being paid to Peter or to anyone on his behalf under his social security account (Tr. 158).

On January 25, 1984, Plaintiff advised the Social Security Administration that Peter had a wife, gave her social security number and indicated that the wife was deceased (Tr. 160-62). An undated letter to Peter, signed by Mr. McGurn, which appears to be in response, indicated that Peter was not receiving any type of social security benefits based on his own work (Tr. 163). In a letter dated February 7, 1984, Plaintiff again requested information regarding Peter's alleged receipt of benefits and enclosed bank information as to Peter's and Mamie's account (Tr. 42, 164-66). Finally, on February 8, 1984, Mr. McGurn advised plaintiff that SSA had made a thorough investigation of the matter, and that there was no more information that could be provided (Tr. 167). Mr. McGurn, who testified as a witness, was unable to explain why, having been made aware of the information in January 25, 1 984 and February 7, 1984 letters from Plaintiff, he did not indicate that Peter could be entitled to benefits in his February 8, 1984 reply (Tr. 44-45).

In 1983 and 1984, Plaintiff alleging misuse and embezzlement of Peter's funds by Marie Law, Peter's sister-in-law and executrix of Mamie's estate, petitioned the court for appointment of a committee for Peter (Tr. 200-215, 281-83). In June 1984, Horace A. Gioia was appointed by the court as the committee of the person and property of Peter (Tr. 169-72, repeated at 188-90). After Plaintiff petitioned for a change of committee, in October 1989, the court appointed Plaintiff and Eleanor lannaccone as cocommittee for Peter (Tr. 81, 142-45, 146, 153, 169).

Plaintiff inquired in 1992 as to whether Peter was entitled to Medicare benefits. At that time, he learned that Peter had been eligible to apply for widower's insurance benefits on Mamie's account (Tr. 96-97). Peter signed an application for widower's insurance benefits on April 16, 1992 (Tr. 127). Peter died four days later on April 20, 1992 (Tr. 147). Three days after Peter's death, on April 23, 1992, Plaintiff filed Peter's application for widower's insurance benefits, as well as a request to be selected as representative payee for Peter and a claim for himself for amounts due in the case of a deceased beneficiary (Tr. 125, 129, 131). Plaintiff's application was granted on August 16, 1992, but only authorized payment of benefits since October 1991, six months prior to the date of the application (Tr. 135). Plaintiff was subsequently named executor of Peter's estate (Tr. 174, 362, 363). Plaintiff also submitted information to the Appeals Council (Tr. 297-378). The Appeals Council determined that Plaintiff provided the same arguments before the ALJ (Tr. 12).

DISCUSSION

I. SCOPE OF JUDICIAL REVIEW

The Social Security Act states that, upon review of the Commissioner's decision by the district court, "[t]he findings of the [Commissioner] as to any fact, if supported by substantial evidence, shall be conclusive . . . " 42 U.S.C. sec. 405(g). Substantial evidence is defined as evidence which a "reasonable mind might accept as adequate to support a conclusion... Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938), Quoted in Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); Jones v. Sullivan, 949 F.2d 57, 59 (2d Cir.1991). Under these standards, the scope of judicial review of the Commissioner's decision is limited, and the reviewing court may not try the case de novo or substitute its findings for those of the Commissioner. Richardson, Supra, 402 U.S. at 401. The court's sole inquiry is "whether the record, read as a whole, yields such evidence as would allow a reasonable mind to accept the conclusions reached" by the Commissioner. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir.1982) see also Grey v. Heckler, 721 F.2d 41, 46 (2d Cir. 1983).

However, "[b]efore the insulation of the substantial

evidence test comes into play, it must first be determined that the facts of a particular case have been evaluated in light of correct legal standards." Klofta v. Mathews, 418 F.Supp. 1139, 1411 (E.D.Wis.1976), qouoted in Gartmann v. Secretary of Health and Human Services 633 F.Supp. 671, 680 (E.D.N.Y.1986). The Commissioner's determination cannot be upheld when it is based on an erroneous view of the law that improperly disregards highly probative evidence. Grey v. Heckler, 721 F.2d 41. 44 (2d Cir.1 983); Marcus v. Calif ano, 615 F.2d 23, 27 (2d Cir.1979). Thus, the Commissioner's determination will only be reversed if it is not supported by substantial evidence or there has been a legal error. See Grey, 721 F.2d at 44; Marcus v. Califano 61 5 F.2d 23, 27 (2d Cir. 1979)

II. ACTUAL FILING OF APPLICATION

In order to obtain benefits, a claimant must first file an application documenting his claim with the Secretary. 20 C.F.R. § 404.610-404.615. Here, the ALJ found that no application was filed until April 23, 1992 (Tr. 20, 21, see 125, 129, 131). Specifically, the ALJ stated as follows:

> In his many letters to the Administration, the claimant has alleged that Peter actually received social security benefits in the past and that Administration officials have intentionally mislead him regarding that purported fact. However, after a comprehensive review of the immediate record and further inquiry into the social security histories of both Peter and Mamie, the Administrative Law Judge can find absolutely no evidence or reason to believe that Peter ever was entitled to benefits on any social security account, until the granting of the April 1992 application. (Tr. 21).

Plaintiff does not dispute that he did not file an application until April 23, 1992, but continues to speculate that Marie Law had applied for and was receiving, and misusing, Peter's benefits from 1978 to 1983, while Peter was still alive. See e.g. Doc. No. 1, ¶ 41. However, Plaintiff's arguments and demands for discovery are premised upon the mistaken belief that he may still pursue a

claim pro se against Marie Law for this alleged misuse of funds. As discussed, supra, any such claim for misuse, to the extent that one could be asserted, belonged to the Estate, which Plaintiff may not represent pro se.

Instead, as the Second Circuit explained, his pro se claim against the Commissioner is based upon his application, filed after his father's death, pursuant to 42 U.S.C. § 404(d) for underpayment of social security benefits that were due his deceased father. Iannaccone, 142 F.3d at 559; see also (Tr. 131). The Second Circuit also explained that Plaintiff, not the Estate, would be entitled to the benefits due under this claim since he, as decedent's sole surviving child, has priority over the Estate. Id. (citing 42 U.S.C. § 404(d) and 20 C.F.R. § 404.503). Thus, since Section 405(d) only applies where "an individual dies before any payment due him . . . is completed", Plaintiff's argument that the ALJ failed to properly develop the record as to benefits allegedly paid out prior to his father's death is misplaced and not relevant to his claim.

III. DEEMED FILING OF APPLICATION BASED UPON MISINFORMATION

The Social Security Act provides that an applicant for social security benefits may be excused from the formal filing requirements of the act only as follows:

> In any case in which it is determined to the satisfaction of the Commissioner of Social Security that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of--
>
> (A) the date on which such misinformation was provided to such individual, or
> (B) the date on which such individual met all requirements for entitlement to such benefits (other than application therefor).
>
> 42 U.S.C. § 402(j)(5); see also 20 C.F.R. § 404.633(a).

The Commissioner's regulations provide the following requirements for finding that employee misinformation caused the applicant's failure to file:

> (1) the misinformation must have been provided to you by one of our employees while he or she was acting in his or her official capacity as our employee. For purposes of this section, an employee includes an officer of SSA.
> (2) misinformation is information which we consider to be incorrect, misleading, or incomplete in view of the facts which you gave to the employee, or of which the employee was aware or should have been aware, regarding your particular circumstances..., in addition, for us to find that the information you received was incomplete, the employee must have failed to provide you with the appropriate, additional information which he or she would be required to provide in carrying out his or her official duties.
> (3) the misinformation may have been provided to you orally or in writing.
> (4) the misinformation must have been provided to you in response to a specific request by you to us for information about your eligibility for benefits. .
>
> 20 C.F.R. § 404.633(c).[5]

5 This section applies only to misinformation which was provided after December 1982. 20 C.F.R. sec. 404.633(g). In addition, this section is effective only for benefits payable for months after December 1982. Id see also Rashad v. Sullivan, 903 F.2d 1229 (9th Cit. 1990).

The burden of proof is on the claimant to demonstrate that he received misinformation from an agency employee that caused a failure, as of a particular date, to apply for monthly insurance benefits. Grubart v. Shalala, 913 F.supp. 243, 247 (S.D.N.Y. 1996).

Here, the ALJ concluded that Plaintiff's application should be deemed to have been filed on January 25, 1984, but

not prior thereto (Tr. 17). The ALJ noted that Plaintiff first mentioned that Peter was widowed in his letter of January 25, 1984 (Tr. 24). Although Plaintiff had sent letters in January and February 1983 (Tr. 155, 156-57), they related exclusively to his belief that Peter had an SSA account, and that the funds were being misused (Tr. 155, 156-57). In this Court's view, the ALJ correctly determined that, as of January 25, 1984, the information contained in Plaintiff's letter should have prompted SSA to ascertain that Peter was eligible to apply for benefits on Mamie's account and to so inform Peter or those acting on his behalf. Because the SSA did not do so, this resulted in the failure of such parties to file an application at that time (Tr. 23-24)

CONCLUSION

For the reasons set forth below, this Court will grant Defendant's motion for judgment on the pleadings.

ORDER

IT HEREBY IS ORDERED, that Defendant's motion for judgment on the pleadings (Doc. No. 19) is GRANTED;

FURTHER, that Plaintiff's motion for delayed service of process (Doc. No. 15), motion for acceptance of corrections to the administrative record (Doc. No. 37), motions for acceptance of supplementation of the record (Doc. Nos. 46 & 47), motion to deem the primary issue to be joined with combined motion for formal discovery (Doc. No. 48)/and motion to perfect the record (Doc. No. 54) are DENIED;[6]

FURTHER, the Clerk of the Court is directed to take the necessary steps to close this case.

SO ORDERED.

S/S William M. Skretny
United States District Judge

Dated: March 31, 2000 Buffalo, New York

6 These motions pertain to Plaintiff's mistaken belief that he may still proceed pro se against Marie Law, which are moot, or to matters that are not material to the issues before this Court. In this regard, this Court further notes that Marie Law has withdrawn her counter-claim against Plaintiff, see Doe. No. 28 , ¶ ¶ 24-25; Doc. No. 58.

United States District Court
WESTERN DISTRICT OF NEW YORK
JUDGMENT IN A CIVIL

William G. Iannaccone

v. CASE NUMBER: 95-cv-555 (S)

Kenneth S. Apfel, Commissioner of
Social Security

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants motion for judgment on the Pleadings is granted.

ORIGINAL WAS RECEIVED
AND FILED APR 03 2000

Date: April 3,2000 RODNEY C. EARLY, CLERK
By: Jane Dennis Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of January two thousand one.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE DENNIS JACOBS,
HONORABLE JOSE A. CABRANES,
Circuit Judges.

WILLIAM G. IANNACCONE,

Plaintiff-Counterclaim-Defendant -Appellant,

-V.

No. 00 -6185

MARIE LAW, former "Custodian" of SSA,

Defendant - Counterclaimant,

KENNETH S. APFEL, Commissioner of Social Security,

Defendant-Appellee.

Appearing for Appellant: William G. Iannaccone pro se, Cheektowaga, N.Y.

Appearing for Appellee: Sandra M. Grossfeld, Ass't Reg. Coun. Soc. Sec. Admin., N.Y., N.Y.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the record from the United States District Court for the Western District of New York, and was argued by appellant pro se and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and vacated in part, and the matter is remanded to the district court for remand to the Commissioner.

Plaintiff William Iannaccone, pro se and fee paid, appeals from a judgment of the United States District Court for the Western District of New York, William M. Skretny, Judge, granting the motion of defendant Commissioner of Social Security ("Commissioner") for judgment on the pleadings, denying Iannaccone's claim for underpayment of social security benefits from October 1976 to January 1984. On appeal, Iannaccone contends principally that the district court erred in concluding that the Commissioner's denial of benefits was supported by substantial evidence. He also seeks an award of damages against the Commissioner and contends that the district court erred in refusing to reinstate his claim against defendant Marie Law. For the reasons that follow, we affirm in part and vacate and remand in part.

Subsequent to the filing of Iannaccone's brief on this appeal, the Commissioner has taken the position that Iannaccone's claim for underpayments should be granted, and it has confirmed that "the Commissioner agrees to calculate and pay spouse's and widower's benefits to William Iannaccone, as survivor of Peter Iannaccone, for the months from October 1976 to January 1984." (Undated letter to this Court from counsel to the Commissioner, received on January 3, 2001; see also Commissioner's brief on appeal at 10 ("The Commissioner respectfully submits that the decision of the district court be reversed and remanded to the Commissioner for the purpose of issuing a fully favorable decision on plaintiff's underpayment claim."). Accordingly, Iannaccone's claim for underpayments has become moot, and we vacate so much of the judgment as dismissed that claim; we remand to the district court for remand to the Commissioner to calculate and pay Iannaccone's claim for underpayment of social security benefits.

In addition, although a successful pro se litigant is not entitled to an award of attorneys' fees, see generally Kay v. Ehrler, 499 U.S. 432 (1991), Iannaccone is entitled to an award of costs, both with respect to this appeal, see generally Maida v. Callahan, 148 F.3d 190, 193 (2d Cir. 1998); 28 U.S.C.A. § 2412(a) (1); and with respect to the proceedings in the district court,see id Fed. R. Civ. P. 54(d) (1). The Commissioner has represented to this Court by letter dated January 11, 2001, that he will not object to the taxation of actual costs pursuant to 28 U.S.C. § 1920 with respect to the present appeal or a prior appeal, No. 97-6045, decided in Iannaccone v. Law, 142 F.3d 553 (2d Cir. 1998) ("Iannaccone I"). Costs with respect to the appeals will be determined in accordance with 28 U.S.C. § 1920. We leave it to the district court on remand to calculate the appropriate amount of costs with respect to the proceedings in that court.

We affirm so much of the judgment as denied Iannaccone's request to reinstate his claim against Law. The district court's dismissal of the claims against Law was affirmed in Iannaccone I, 142 F.3d at 560. That affirmance constitutes the law of the case, and we have been informed of no reason why we should not adhere to that decision, see generally Agostini v. Felton, 521 U.S. 203, 236 (1997); Doe V. New York City Department of Social Services, 709 F.2d 782, 789 (2d Cir.), cert. denied, 464 U.S. 864 (1983).

Finally, to the extent that Iannaccone requests an award of damages, we reject that contention for lack of subject matter jurisdiction. It is well established that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued," and hence may be sued only to the extent that it has waived sovereign immunity by enacting a statute consenting to suit. United States v. Sherwood, 312 U.S. 584, 586 (1941). "[T]he terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Id. Congress has not consented to a suit against the United States for damages in circumstances such as these.

We have considered all of Iannaccone's contentions on this appeal and, except to the extent indicated above, have found them to be without merit. The judgment of the district court is vacated to the extent that it dismissed the claim against the Commissioner for underpayments of benefits. The matter is remanded to the district court for calculation of the costs to be awarded to Iannaccone, and for remand to the Commissioner for calculation and payment of Iannaccone's underpayment claim. In all other respects, the judgment of the district court is affirmed.

FOR THE COURT:

S/S Roseann B. MacKechnie
ROSEANN B. MacKECHNIE, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of May two thousand one.

Iannaccone,

Appellant,

V

Docket No: 00-6185

Secretary,

Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant William Iannaccone.

Upon consideration by the panel that decided the appeal, it. is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

S/S Roseann B. MacKechnie
ROSEANN B. MACKECHNIE, Clerk
Administrative Attorney

MAY 3 -
ROSEANN B. MACKECHNIE CLERK

UNITED STATES COURT OF APPEALS.
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
Foley Square
New York, New York

In the Matter of:

WILLIAM G. IANNACCONE

Plaintiff -Counterclaim
Defendant -Appellant

-versus-

MARIE LAW, former "Custodian" of SSA
Defendant -
Counterclaimant
KENNETH S. APFEL, Commissioner of

Social Security

Defendant-Appellee

New York

January 10, 2001

BEFORE:
THE HONORABLE AMALYA L. KEARSE
THE HONORABLE DENNIS JACOB
THE HONORABLE JOSE A. CABRANES
Circuit Court Judges

APPEARANCES:
FOR THE APPELLANT:
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CIRCUIT COURT RECORDING
MONITOR: None

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. PROCEEDINGS

JUDGE KEARSE: Iannaccone against Apfel.
Mr. Iannaccone?
MR. IANNACCONE: Greetings, distinguished panel. Plaintiff is here to extend my courtesy to this Honorable Court, to answer any questions the panel may have.
But first a summary in deferring to Plaintiff's brief.
Plaintiff's brief is very clear as to the true facts, real issues and rules that apply to this case.
Clearly, the Administrative Law Judge did not base his decision on the probative evidence. This case must be remanded to the SSA, by mandate, to fully develop the administrative record as provided for in Webb V. Finch, as cited in Plaintiff's brief at page 26 paragraph 4.
Plaintiff has the statutory right to all the SSA records pertaining to Peter Iannacccone as the legal representative of my father's estate and as the party in interest in this action. Those rights must be protected by this Court as cited in Plaintiff's brief at page 27,

paragraph 2. (*see corrected page at end)
"Plaintiff-Appellant is entitled to receive
a certified copy of all additional records
disclosed in developing the record and a
verified statement, upon completion of the
development of the record, by the SSA that an
exhaustive release, as mandated by this Court,
has been finalized, to verify that no other
records remain undisclosed, or unaccounted for,
to be subscribed, under oath, by the SSA
Commissioner."
Plaintiff's pro se claim against the
Defendant SSA Commissioner, as upheld by this
Court's opinion of April 27, 1998, legally and
properly, enables plaintiff to move against the
SSA Commissioner to produce the November 1976
application made for Peter Iannaccone that
Plaintiff asserts was filed correctly for
spousal benefits.
JUDGE KEARSE: Mr. Iannaccone, did you
receive a copy of the Commission's letter which
was addressed to this Court saying that the
Commission agrees -- the Commissioner agrees to
calculate and pay --
MR. IANNACCONE: Yes, I'll address that in
one second.-
JUDGE KEARSE: -- that agrees to calculate
and pay the benefits --
MR. IANNACCONE: I'm going to address that
in one second.
JUDGE KEARSE: -- that you have claimed?
MR. IANNACCONE: Yes, I'm going to address
that. Contrarily, Defendant SSA Commissioner
implies in his brief, at page 5, paragraph 2 and
at page 7 paragraph 1 that the November '76
application was filed incorrectly for retirement
benefits without proof of sufficient evidence.
The fact that the SSA Commissioner is
willing to make back payments under a false
pretext, *does make this action moot, as the
Defendant SSA -Commissioner implies in his brief
at page 7, paragraph 2, since Plaintiff would
not receive full remedy to include interest, Pro

Se litigant compensation and other damages sought by Plaintiff and that would be entitled to plaintiff upon the production of the SSA records, by the SSA Commissioner, that will prove plaintiff's charges as made against SSA Commissioner and as made against proper party defendant Marie Law, in this action, for conversion of the SSA funds at issue in this action, as the former fiduciary

The SSA, from the ALJ determination to Defendant SSA Commissioner's brief avoids what it's own administrative records deceivingly imply, that the "file was destroyed in "9/84 " as shown in Plaintiff's appendix page 8, 28, 41, 87, 150 and by the recent informal letter made March 5, 1998, Appendix page 151, in a violation of Rule 5 U. S. Code Service section 552 a (e) (5) , as cited in plaintiff's brief at page 18 Plaintiff, however after review of what was described to me as the "Incomplete-Duplicate claim file of Mamie Iannaccone" found no indication whatsoever that any file was destroyed 9/84. The only reference --

JUDGE KEARSE: Mr. Iannaccone, you've reserved a minute for rebuttal. You may use that now, if you wish

MR. IANNACCONE: I do

JUDGE KEARSE: But, if you wish to have a minute for rebuttal, then you --

MR. IANNACCONE: Well, can I have another I am Pro Se, and I just have a few paragraphs. to go

JUDGE KEARSE: I understand that. You may use that minute for rebuttal, right now, if you wish: it's your choice

MR. IANNACCONE: I'll continue.

JUDGE KEARSE: Very well

MR. IANNACCONE: The only reference to anything being destroyed, like I said, I reviewed what was described to me as a "incomplete duplicate claim file of Mamie Iannaccone".

The only reference to anything being

destroyed in 9/84 is clearly shown on the SSA ACR Disposition form, Appendix page 153 whereupon it is noted " Original folder destroyed 9/84" and where it is stated this quote. "This form must be completed and attached to each folderless package" and where Mamie Iannaccone's SSA number appears, 126-05-2576.

Plaintiff has submitted this original SSA certified copy of this document, Appendix page 153, in the U.S. District Court -file CV-555-(S), Docket number 52, as explained in plaintiff's affidavit at paragraph 26 filed September 8, 1998 as exhibit I.

This court is empowered by Congress to issue any writ, in the aid of exercise of jurisdiction as provided by 28 U.S. Code Service section 1651. Further, this court must avoid further delay of relief to plaintiff where delay is avoidable and relief is proper and as provided in Parsons versus Heckler, as cited in Plaintiff's brief at page 29, paragraph 2.

JUDGE KEARSE: Mr. Iannaccone.

MR. IANNACCONE: Just --

JUDGE KEARSE: You'll have to rely on your brief for the rest. Thank you. We'll hear from the other side.

MR. IANNACCONE: Thank you, Your Honor.

MS. GROSSFELD: Good morning.May it please the Court, my name is Sandra Grossfeld and I represent Appellee, Social Security Administration, in this case.

JUDGE KEARSE: Could you tell us exactly what your position is? I see you listed an Assistant United States Attorney, or as an Assistant Regional Counsel or as a senior attorney for the Social Security Administration. Do you hold all of those positions?

MS. GROSSFELD: No, ma'am. No, Judge. The position that I hold is listed as Assistant Regional Counsel, which is a generic term used in Social Security Administration, and also Senior Attorney, which is the term that's been

printed on our business cards
JUDGE KEARSE: So, you're not an Assistant United States Attorney
MS. GROSSFELD: No. and if it said that anywhere I--
JUDGE KEARSE: -- as indicated on the last page of the brief
MS. GROSSFELD: -- apologize. No, I am not. We intend to rest on our brief, unless the Court has any questions
JUDGE KEARSE: That was my only question of you.
MS. GROSSFELD: I'm very sorry about that
JUDICIAL PANEL MEMBER: I just have one question. Is there anything that you're offering to give him that he could get -- is there anything else that he can get by this appeal, if he prevails on this appeal? Is he able to get costs or fees or anything of that sort?
MS. GROSSFELD: Well, I guess our position would be that after the Court enters it's order, that he would be able to apply for such costs, fees ——
JUDICIAL PANEL MEMBER: In the District Court?
MS. GROSSFELD: In the District Court?
JUDICIAL PANEL MEMBER: That's what I'm asking you. I'm not stating it, I'm asking a question. If we do what you want us to do, what happens to the case? And what happens to his claim for costs and fees?
MS. GROSSFELD: His claim for costs and fees, I believe is addressed in the brief. We said that in the event that the Court dismisses his claim, he could bring up an action for costs. However --
JUDICIAL PANEL MEMBER: Surly not an another action. Anything but that. Just how does he get it?
MS. GROSSFELD: I could make-- I would have to confer with my office.

JUDICIAL PANEL MEMBER:Are you conceding here, that he's entitled to fees and costs?
MS. GROSSFELD: Fees, no.
JUDICIAL PANEL MEMBER: What is he entitled to?
MS. GROSSFELD: He may be entitled to costs. But, as far as the attorneys fees that he's asking --
JUDICIAL PANEL MEMBER: May be or is entitled? Which is it?
MS. GROSSFELD: Well --
JUDICIAL PANEL MEMBER: You concede that he's entitled to cost, correct?
MS. GROSSFELD: I guess it would be the amount of the cost, Judge.
JUDICIAL PANEL MEMBER: All right, let's put that down as a concession. Is that agreeable to you?
MS. GROSSFELD: Yes.
JUDICIAL PANEL MEMBER: What else is he entitled to, anything else? And why is that?
MS. GROSSFELD: Because as an non-attorney, he's not entitled to his legal fees in this action.
JUDICIAL PANEL MEMBER: Okay. Fine.
JUDICIAL PANEL MEMBER: How about interest?
MS. GROSSFELD: There is no -- we just said in our brief there is no interest available in Social Security cases. Schelicki versus Schwieker (sic).
JUDICIAL PANEL MEMBER: So, can we -- let's assume for the argument, you prevail here. Should we just enter a judgment based on your concession of cost, we don't have to remand this, is that right?
MS. GROSSFELD: For the purpose of costs?
JUDICIAL PANEL MEMBER: Yeah
MS. GROSSFELD: Uh --
JUDICIAL PANEL MEMBER: Is there any need to remand this? Except for computation?
MS. GROSSFELD: We did state at page 9 of our brief, to the extent that he's seeking costs on his prior appeal, this is footnote 5 at page

9; he should have raised the issue at the time of his prior appeal
JUDICIAL PANEL MEMBER: But, that's -- but, you're now agreeing that he's entitled to costs for the whole time, right?
MS. GROSSFELD: Not his prior appeal
JUDICIAL PANEL MEMBER: That was for both - not for --
MS. GROSSFELD: Not his prior appeal.
JUDGE KEARSE: Then in the District Court?
MS. GROSSFELD: My understanding is that with regard to costs in District Court that they are supposed to be brought in District Court, but it would be a matter of working out and submitting the costs -
JUDICIAL PANEL MEMBER: It seems equitable, doesn't it, given the fact that after these many months or years he's prevailed; doesn't it seem reasonable to you that at a minimum, the costs incurred in these various proceedings be paid?
MS. GROSSFELD: Your Honor, we certainly don't seek further litigation in this case.
JUDICIAL PANEL MEMBER: So, you're agreeable to that --
MS. GROSSFELD: However --
JUDICIAL PANEL MEMBER: -- you're conceding and stipulating to giving him costs for the various proceedings?
MS. GROSSFELD: Well --
JUDGE KEARSE: Except the prior appeal?
MS. GROSSFELD: Except for the prior appeal. And that the -- the amount of the costs would of course be --
JUDICIAL PANEL MEMBER subject to calculation.
MS. GROSSFELD: -- have to be determined
JUDICIAL PANEL MEMBER: subject to calculation
JUDICIL PANEL MEMBER: Yes, but surly your position is that he's entitled to what he's been seeking all this time, and that's a period of years; I'm not sure why he wouldn't be entitled to costs from day one.
MS. GROSSFELD: Aah --

JUDICIAL PANEL MEMBER: At what point does the Social Security Administration look at this claim or at any claim and decide whether somebody is entitled to benefits?

MS. GROSSFELD: Well, this has been a somewhat unusual course of litigation, but --

JUDICIAL PANEL MEMBER: I don't think it's unusual. I mean somebody has sought benefits that they are entitled to. And now years and years later, the Social Security Administration just concedes that they are entitled to it. You certainly couldn't pay it if he wasn't entitled to it. Because statutorily that would be impossible.

MS. GROSSFELD: That's right, Judge. And we do --

JUDICIAL PANEL MEMBER: So, he is entitled to it. I don't know -- What I don't understand is -why Mr. Iannaccone has been litigating this~ for years and years and years, and now on the eve of oral argument, the second oral argument in the Second Circuit, somebody bothers to go and figure out what the estate is entitled to. it's inconceivable. It's a terrible waste of time for everybody.

MS. GROSSFELD: Yes, I agree, Your Honor. Just with regard to your question regarding --

JUDICIAL PANEL MEMBER: So why don't you at least consider going back to your clients and suggesting that they pay the cost of the first time around?

MS. GROSSFELD: I would certainly do that, Judge.

JUDGE KEARSE: Thank you. We will reserve our decision.

(Proceedings concluded. Decision reserved.)

I, ____Rhett L. Baker____, certify that the foregoing transcript of proceedings in the United States Court of Appeals for The Second C$_4$ircuit, Foley Square, New York, New York in the matter of:

WILLIAM G. IANNACCONE, plaintiff

VERSUS

MARIE LAW and KENNETH S. APFEL, Defendants
Docket 00-6185 was prepared using electronic

transcription equipment and is a true and accurate record of the proceedings.

Signature s/s Rhett L. Baker

Associated Reporting Service

Post Office Box 674

229 West Genesee Street

Buffalo, New York 14201 -0674

Date: 2—1—2001

one second.
JUDGE KEARSE: -- that agrees to calculate and pay the benefits --
MR. IANNACCONE: I'm going to address that in one second.
JUDGE KEARSE: -- that you have claimed?
MR. IANNACCONE: Yes, I'm going to address that. Contrarily, Defendant SSA Commissioner implies in his brief, at page 5, paragraph 2 and at page 7 paragraph 1 that the November '76 application was filed incorrectly for retirement benefits without proof of sufficient evidence. The fact that the SSA Commissioner is willing to make back payments under a false pretext, doesn't make this action moot, as the Defendant SSA Commissioner implies in his brief at page 7, paragraph 2, since Plaintiff would not receive full remedy to include interest, Pro Se litigant compensation and other damages sought by Plaintiff and that would be entitled to Plaintiff upon the production of the SSA records, by the SSA Commissioner, that will prove Plaintiff's charges as made against SSA Commissioner and as made against proper party defendant Marie Law, in this action, for

This is to certify that, after reviewing the cassette tape in the above proceeding as regards Page 4, Line 15, -- "false pretext, doesn't make this action moot, as the" --; that the "doesn't", in my opinion, is correct as written in the correction of that transcript page, and not "does". This is in reference to the transcript of proceedings in the United States Court of Appeals for The Second Circuit, Foley Square, New York, New York in the matter of:

WILLIAM G. IANNACCONE, plaintiff

VERSUS

MARIE LAW and KENNETH S. APFEL, Defendants
Docket 00-61 85

Signature S/S Elmer Cone Baker

Associated Reporting Service

Post Office Box 674

229 West Genesee Street

Buffalo, New York 14201 -0674

Date: 6-4-2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ESTATE CF PETER IANNACCONE, Deceased,
by WILLIAM G. IANNACCONE, ADMINISTRATOR and.
CLAIMANT, pro se,

Plaintiff,

V. 95-CV-555 (S)

(1) SHIRLEY S. CHATER, COMMISSIONER
of SOCIAL SECURITY, and
(2) MARIE LAW, Former Custodian of
SSA Funds Payable for PETER
IANNACCONE

Defendants.

PETER IANNACCONE
SSN 712-14-2693
DOB. 3/2/11, DOD. 4/20/92

Mamie Iannaccone
SSN 126-05-2576
(fully insured wage earner)
DOB. 3/30/18,
DOD. 10/15/78

Married 4/24/38
Never Divorced.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS
CITY CF BUFFALO)

Miss Keller, being duly sworn, deposes arid says:

1. I am a Social Security Administration representative at the Cheektowaga branch office, located at 2875 Union Rd., Cheek. N. Y.

2. I am providing this Affidavit, at the request of William G. Iannaccone, the Administrator of the estate of PETER IANNACCONE, as shown on the original Certificate of Administration, certified on July 31, 96 and hereto attached, and whom is also the stated Claimant and Attorney pro se in the above captioned matter.

3. I am providing this Affidavit, at my own free will, in my capacity as a Social Security Administration representative, to promote the efficient administration of Social Security Law, as defined under "the Act."

4. I have carefully reviewed the indicated SSA form 5002, dated 10/21/92, and computer read-outs marked Exhibits 21 and 22 and/or marked (pages) 193 to 198, hereto attached, in addition to the above given information on Peter and Mamie Iannaccone, for my findings herein described, and as follows.

5. I find no proof that when the indicated application, for Mamie, for SSA Disability Insurance benefit, was made, and granted in October 1976, that such application did not seek insurance for her husband PETER.

6. I find that the appropriate type of SSA insurance benefits for PETER to file for in November 1976, would have been Husband's insurance, and not Retirement insurance, or proof Husband's Ins. was not filed in Nov. 1976.

7. I find no proof that when the indicated SSA application was made for PETER in November 1976, that such application was filed incorrectly, only on his Social Security account, or proof it was not filed correctly on Mamie's Social Security account, as well, whom was fully Insured.

8. Although Mamie's income is shown in the SSA computer, Peter's is not shown, therefore it is possible that Peter's Income was not reported when filing his indicated Nov. 1976 application, allowing him to prove dependency, in 1976.

9. I find no proof that PETER did not prove dependency on Mamie, for his indicated SSA application for SSA insurance, made in November 1976.

10. I find no proof that when the indicated application for the lump-sum death benefit, was granted, for PETER, in 1979, on Mamie's account, that SSA Widower's Insurance benefits were not granted.

11. I find the indicated SSA report 5002, dated 10/21/92, hereto attached, to be generated by the SSA Northtown Plz. branch office, as indicated by # 145, and have reviewed the computer read-outs marked Exhibits 21 and 22 and/or marked (pages) 193 to 198, also hereto attached, and admit that anybody could have made an error in typing, and/or entering information on such reports.

12. That the available SSA benefit payment records, including those kept at the Northeastern Program Svc. Center, should provide the proof as to whether or not SSA benefit payments where made for PETER, prior to June 1983. Also, the available SSA records should provide information pertaining to if a representative payee was ever made, for PETER, to whom, and address of the person or agency, to which SSA benefit payments were sent, and copies of the negotiated checks.

s/s Miss Keller

Subscribed and sworn to
before me this 6th day of
August 1996.

S/s Melvin L. Reinheimer
NOTARY PUBLIC
MELVIN L. REINEIMER
NOTARY PUBLIC, STATE OF NEW YORK,
QUALIFIED IN ERIE COUNTY
My COMMISSION EXPIRES JUNE 30,1998

CERTIFICATE 0F APPOINTMENT

THE PEOPLE of the STATE of NEW YORK

To all to whom these presents shall come or may concern,

Send Greetings:

This is to Certify, That after having examined the records and files of the Surrogates's Court of the County of Erie, State of New York, now remaining in the Surrogate's office of said County; I find that

LETTERS OF ADMINISTRATION upon the Estate
of: PETER IANNACCONE

late of the TOWN OF CHEEKTOWAGA in said County of Erie, deceased, were duly granted by the said Court on November 5, 1992 to:

WILLIAM G. IANNACCONE

and that said letters are still valid and in full force.

IN TESTIMONY THEREOF, We have caused the seal of our Surrogate's Court to be hereunto affixed at the City of Buffalo, in said County of Erie, on July 31, 1996

S/S Paul J. Smaldone

REPORT OF CONTACT
TO:
NE MAT SE GL WN MAM

ACCOUNT NUMBER AND SYMBO
126-05-2576
NAME OF WAGE EARNER OR SE PERSON
MAMIE IANNACCONE

ODO DIO DDS

PERSONS CONTACTED AND ADDRESS
( )WE OR SE PERSON ( ] OTHER *(Specify)*

CONTACT MADE

DATE OF CONTACT

SUBJECT Recon. Req. by son of Dec'd D1

D1 filed A clm- in 1976 which was denied for lack of insured status. He didn't file for husband's benefits- probably did not meet dependency due to his VA benefits. However we should check A clm to see if D1 was closed out.

D1 filed for LS + we paid 02 79.
ic often 01 79-ooo D1 was closed out per G.W. 204.025G3. It is clear that we should have taken a D1 clm then as no dependency requirement.

Son's 1984 ltr (his P/C) mention Mamie + her SSAN- this is a lead. We have no idea how this lead was disposed of. Certainly there is an argument "good cause" for accepting son as a proper applicant. (D1 had a committee) RSI/ Circular 03-84-DRSI) dated 3/6/84

EXHIBIT 21

S/S Phil Bonsqus

Date of Report
10/21/92

District Office 145

Form SSA 5002 (8-81)

AACT DTE:05/13/93 S SSN 712—14—2693 BIC: DOC:X34
UNIT:KMH PG 001
STATUS MBR YES LOU—05/13 DATA FILES NO LOU—0S/13
SSACCS NO LOU 05/12
CPSNO
ACCOUNT PCOC—4 QCE—O0 QCR-24 SP—M CIS—NI
PAYMENT PIC—A MPA—$0.00 DOC—145 SCC—33240
PETER IANNACCONE
4121 BAILEY AV BUFFALO NY 14226—0000
BENEFIT BIC—A PETER IANNACCONE SB—M DOB—
03/02/11 B ABN—D210 LAF—N
MBP—$0. 00 BPC—A DRD— 1 2/27/76 DOF 11/76
X-REF— XRTC-S XAN—126—05-2579 RDD026

EXHIBIT 22

FACT DTE:05/13/93 SSN: 712—14—2693 BIC: DOC:X34
UNIT:KMH

PG
001
STATUS MBR YES LOU—05/13 DATA FILES NO LOU—05/13

SSACCS NO LOU—05/12 CPS NO
ACCOUNT PCOC—4 NOP—01 QCE—00 QCR—24 SP—M CIS—NI

LUM—05 LMM—01/77 FLI—M
PAYMENT PIC—A MPA—$0.00 NOB-01 DOC-145 SCC—33240

CAD-12/27/76 F/LLOA-2/3
PAYEE PETER IANNACCONE

4121 BAILEY AV BUFFALO NY 14226—0000
BENEFIT BIC—A PETER IANNACCONE SB—M DOB—03/02/11 B

ABN—D210 LAF—N

MBP—$0.OO BPC—A DRD—12/27/76 DOF—11/76

ARFC— RDD—026 TOC—2
X—REF XRTC—S XAN—126—05—2579

SEQY DTE :1. /21/92 AN 126 05 2579 DOC : 145 : PRB UN1T
MEF: QN 126 05 2579 NA: PFEIFE DB: / SX: M AK:
SUMMARY F ICA EARNI NGS FOR YEARS REQUESTED
6. 66 EARNED 37—50/YEARLY EARING5 AMOUNTS
NOT AVAILABLE NO EARNINGS POSTED FOR YE;ARS
REQUESTED AFTER 1950
SUMMARY MQGE EARNINGS FOR YEARS REQUESTED
NO MQGE EARNINGS FOR YEARS REQUESTED

NUMI DTE 10/21 /92 SSN 126—05 2579 XC :UNIT PRB
PG : 001
ACCOUNT SSN : 126 05 2579 ETC :0 RFN 65231708672
NAME NAA: RALPH PFEIFER
BIRTH DOB XX/XX/1XXX PLB: UN SEX:M. ETB: 1
INTERNAL. FMC CYD : 07/xx/37

ACCT DTE: 10 21/92 SSN: 712 14 2693 BIC DOC 145 UNIT PRB
PG 001
STATUS MBR YES LOU 10/21 DATAVFILES NO LOU 10/21
SSACCS NO LOU 10/20 CPS NO
ACCOUNT PCOC 4 QCE -00 QCR -24 SP- M CIS -NI
PAYMENT PIC-A MPA-$0.00 DOC-145 SCC-33240
PAYEE PETER IANNACCONE
ADDRESS 4121 BAILEY AV BUFFALO NY 14226-0000
BENEFIT BIC-A PETER IANNACCONE SB-M DOB 03/02/11 B
ABN-D210 LAF-N MBP-$0.00 BPC-A DRD-12/27/76
DOF-11/76 RDD-026
X-REF XRTC-S XAN- 126 05 2579

FACT DTE 4/05/93 SSN 126 05 2576 BIC DOS 145 UNIT JOAN PG 001
STATUS MBR YES LOU 04/05 DATA FILES YES LOU 4/05 SSACCS NO LOU 4/02 CPS NO
ACCOUNT PCOC-1 NOP-03 QCE-25 QCR-25 SP-F CIS-I TAC-LS LUM-03 LMM-07/97 PODF-P FLI-M
PRIMARY M IANNACCONE DOB 03/30/18 DOD 10/78 LSPA-$255.00
PI4 HIS (10/76 to 12/90)

BENEFIT BIC-A MAMIE IANNACCONE SB-F DOB 3/30/18 A DOEC-10/76 ABN-WSIV LAF-T1 MBP-$390.50 DRD-08/22/78 DOCA-12/78 DOEI-10/76 DOF 10/76 DOST 10/78 ARFC—TOC-1 CEC-B BDOD 10/15/78
ENROLL HENC-D DOEH-10/78 HOC-E HPAC-$0.00 SENC-I DOES 10/78 SOC-Y SPAC-$36.60 SPP-00 VPAC-$0.00
DIB DDO 04/21/76 DOED 10/76
HISTORY 10/76 $346.10 $ 0.00 000 01 $346.10
6/77 $366.60 $ 0.00 000 01 $366.60
6/78 $390.50 $ 0.00 000 01 $390.50
10/78 $390.50 $ 0.00 000 T10 $390.50
PAYMENT PIC-D1 MPA-$0.00 NOB-01 DOC-B98 SCC-33240 RD-05/22 LAP-V CAD-05/21/92 F/LLOA-2/3
PAYEE PETER IANNACCONE
ADDRESS 119 ELLEN DRIVE CHEEKTOWAGA NY 14225 1214
BENEFIT BIC-D1 PETER IANNACCONE SB-M DOB 03/02/11 B DOEC-10/91 ABN-5BEU LAF-T1 MBP-$812.00 DRD-05/21/92 DOCA-05/92 DOEI-10/91 DOF-04/91

NUMI DTE: 10/21/92 SSN 712 14 2693 XC; UNIT; PRB PG;001+
ACCOUNT SSN; 712 14 2693 ETC;L RFN ; 67150531383
NAME NNA; PETER IANNACCONE
BIRTH DOB; 03/02/1911 PLB; UN SEX; M
INTEGRAL CLD; 11/15/76 DOA; KENMORE NY CYD; 11/08/76
ACCOUNT SSN; 712 14 2693 ETC; 2 RFN; 91025536443 ; DOC:B98 IDN; D
NAME NNA; PETER , WILLIAM, IANNACCONE
NL2 PELLIGRINO, IANNACCONE
BIRTH DOB; 03/02/11 PBL ; BUFFALO, NY SEX; M
ETB;1 CSP:A
PARENT MNA: AMELIA GINO
FNA ANTHONY IANNACCONE
INTERNAL CYD; 01/25/91

NUMI DTE; 10/21/92 SSN; 712 14 2693 XC UNIT; PRB PG; 002
ACCOUNT SSN; 712 14 2693 ETC;T
NAME; PETER IANNACCONE
BIRTH DOB; 03/02/1911 SEX;M
INTERNAL DOD; 04/20/1992 CDN;L721 AMIGONE FNRL HOME CYD;04/28/92

EXHIBIT 19

FACT DTE 4-5-93 SSN 126 05 2576 BIC: DOC 145 UNIT JOAN PG 003
DOST-04/92 SAC-C TOC-0 LMETY-91 BDOD-4/00/92
ENROLL HENC-I DOEH-10/91 HOC-E HPAC-$0.00
SOC-R SPAC-$0.00
BENREF BOAN-712-14-2693
HISTORY 10/91 $ 783.60 $ 0.00 600 01 R $ 783.00
12/91 $ 812.50 $ 0.00 500 01 R $ 812.00
04/92 $ 812.50 $ 0.00 500 T10 R $ 812.00
PAYMENT PIC-GI MPA-$0.00 NOB-00 DOC-145 SCC-33240
RD-03/13 LAP-4 PSC-L CAD-03/13/79 F/LLOA-2/3
PAYEE PETER IANNACCONE
ADDRESS 4121 BAILEY AV BUFFALO NY 14226-0000
BCH PAY PNA-$255.00 THRU 02/79 CMA-$0.00 FOR 03/79
OCO-L SPI-P PPI-O
LSPD LSSC-L LSFD-02/79 LSAP-$255.00
+++ TRANS UPDATED THRU 04/04 +++
TRANS RD 5/23/92 LAP-B MADCAP PIC-D1
RD 5/22/92 LAP-VY MISCOR-ZIP+4 DATA PIC-D1
RD- 5/28/92 LAP-Z3 OPO A- PAYMENT PIC-U1
RD-6/16/92 LAP-VH KILL CREDIT-RCD DEL PIC-A

EXHIBIT 23

SOCIAL SECURITY ADMINISTRATION
Refer to: S2D2B5

26 Federal Plaza
Room 4032
New York, N.Y.10278
March 5, 1998

Mr. William G. Iannaccone
119 Ellen Drive
Cheektowaga, N. Y. 14225-1214

Re: Peter Iannaccone, deceased
SSN 712—14-2693
Mamie Iannaccone, deceased
SSN 126—05—2576

Dear Mr. Iannaccone:

In response to your request of February 18, 1998, we are providing you with the following information.

The Social Security Administration no longer has the records of Peter Iannaccone's application of November, 1976 nor do we have the original files on Mamie Iannaccone. We also do not have information pertaining to Marie Law. These files have been destroyed based on departmental policy.

The file that we currently maintain is Mr. Iannaccone's claim for Widower's benefits from 1992. We are enclosing copies of the claims related material from that file.

You indicated that we show Mamie Iannaccone's mother's maiden name as, Mary Naples and in fact should be Mary Napoli. We retrieved the photocopy. of Mrs. Iannaccone's application for a social security number dated July 27, 1937 in which Mrs. Iannaccone's mother's name is shown as Mary Naples. As this information was provided by Mrs. Iannaccone, we cannot change it at this time. A copy of her application for a social security number is being provided for your review.

If you have any questions please contact Mary M. Francis at (212) 264—2905

Sincerely yours,

S/S Harvey Pessar
Director
Program Operations Center

UNITED STATES DISTRICT COURT STATE CF NEW YORK :
COUNTY OF ERIE

PETER W. IANNACCONE, Estate of
Erie Co. Surrogate file # 92~5085
by
William G. Iannaccone
119 Ellen Drive
Cheektowaga, New York, 14225-1214
Administrator & Claimant

712-14-2693
XREF

126-05-2576
wage earner

COMPLAINT

Plaintiff

INDEX NO
95 -CV-0555(S)

-vs-

(1) Primary-secretary of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
and
(2) Secondary-Marie Law former "Custodian" of SSA
funds payable for PETER W. IANNACCONE, Incompetent
Residence of Attorneys

Defendant(s)

The Plaintiff, the estate of PETER W. IANNACCONE, file # 92-5085, by his Administrator and claimant in this action William G. Iannaccone, having made a diligent search for legal representation, including contacting the Erie County Bar Association on June 6, 1995, and finding no attorney willing to personally provide legal representation, and only willing to provide referrals, therefore having to act as attorney pro se, as and for his Verified Complaint herein respectfully alleges and shows to the Court the following:

AS FOR A FIRST CAUSE OF ACTION

FIRST: That at all times hereinafter mentioned the Plaintiff, was/is a resident of, and by his estate, has an open estate file in the County of Erie State of New York. And that his Administrator and Claimant in this action is also a resident of the County of Erie and State of New York.

SECOND: That at all times hereinafter mentioned Primary Defendant (1) Secretary of Health and Human Services was and is a Federal Agency with branch offices in the State of New York, and County of Erie.

THIRD: That in 1983 and 1984, Your Deponent, whom was the only surviving immediate relative to, living with and in the immediate and direct care of my father PETER W. IANNACCONE, Incompetent, did make a personal and written inquiry to the Northtown Plz. branch of the Social Security Administration to ascertain, whether or not PETER W. IANNACCONE was eligible to receive Medicare coverage and Social Security Benefits.

FOURTH: That, Your Deponent, by personal and written inquiry in 1983 and 1984 did provide all the necessary facts, including the correct Social Security numbers of both PETER W. IANNACCONE, 712-14-2693 and Mamie Iannaccone, 126-05-2576. The fact that PETER W. IANNACCONE was a widower since October of 1978, and that PETER W. IANNACCONE had attained 65 years of age in March of 1976, in order for the Social Security Admin. personnel to correctly determine PETER W. IANNACCONE'S eligibility to Medicare and Social Security Benefits including Widowers Insurance Benefits.

FIFTH: That after having been given all the facts as stated above In Paragraph "FOUR" certain Social Security Admin. representatives at the North-town Plz. branch office did by way of personal interview with Your Deponent in 1983 and 1984 falsely and incorrectly claim to Your Deponent, that PETER W. IANNACCONE was not eligible to receive Medicare due to the fact that he was a 100% disabled veteran and therefore only eligible for medical care provided by the Veterans. Administration. And did falsely and incorrectly claim that PETER W. IANNACCONE was not eligible to receive any Social Security Benefits, that would include Widowers Insurance Benefits. And that Your Deponent was prevented from filing a formal application for PETER W. IANNACCONE, at that time in 1983 and 1984, falsely and Incorrectly claiming there is no need to file such application for PETER W. IANNACCONE, since no benefits are payable to him.

SIXTH: That after having been given all the facts, by me, by written letters in 1983 and 1984 as stated in above Paragraph "FOUR" to Mr. William F. McGurn, Manager, SSA, Northtown Plz. branch office, Mr. William F. McGurn by way of written letters in 1983 and 1984 to Your Deponent and to PETER W. IANNACCONE, did not correctly ascertain that PETER W. IANNA000NE was eligible to receive Social Security Benefits, including Widowers Insurance Benefits, at that time. And that having the fact before him that PETER W. IANNACCONE had attained the age of 65, in March of 1976, Mr. William F. McGurn did not correctly ascertain PETER W.

IANNACCONES eligibility to Medicare coverage, at that time.

SEVENTH: That on April 16, 1992, four days prior to the death of PETER W. IANNACCONE, Your Deponent, again did make a personal inquiry to the Social Security Adimin., Northtown Plz. branch office to ascertain whether or not PETER W. IANNACCONE was eligible to receive Medicare coverage. And again, Your Deponent did provide to the certain attending claims representative all the necessary facts including the correct Social Security numbers of both PETER W. IANNACCONE 712-14-2693 and Mamie Iannaccone 126-05-2576, the facts that PETER W. IANNACCONE was over age 65 and a 100% disabled veteran, in order for such certain attending claims representative to correctly determine PETER W. IANNACCONE'S eligibility to Medicare. Whereupon, the same certain attending claims representative did falsely and incorrectly claim that PETER W. IANNACCONE was not eligible for Medicare due to him being a 100% disabled veteran eligible to receive medical care at the Veterans Administration facilities.

SEVENTH: Your Deponent, at that same time and day of April 16, 1992, then requested to that same certain attending claims representative to provide a written statement to verify her claim that PETER W. IANNACCONE was not eligible for Medicare. And Your Deponent did then explain that PETER W. IANNACCONE was currently hospitalized in a non-Veterans Administration related facility. Whereupon, Your Deponent was directed to the desk of another claims representative a Mr. Paul Bogumil Sr.

NINTH: At that same time and day of April 16, 1992, at the desk of claims representative Mr. Paul Bogumil Sr., Your Deponent, after again providing all the facts necessary in order for a correct determination of PETER W. IANNACCONES eligibility to Medicare and Social Security Benefits, Your Deponent was first informed by Mr. Paul Bogumil Sr. that PETER W. IANNACCONE had been eligible to receive Medicare coverage since March of 1976, at age 65, and that, PETER W. IANNACCONE was eligible to receive Widowers Insurance Benefits from 1978, and that a prior application was made by or for PETER W. IANNACCONE with the Social Security Administration. Mr. Paul Bogumil stated that lacking evidence to the contrary the prior application is open to all benefits, which Includes Widowers Insurance benefits.

TENTH: That on April 16, 1992, Mr. Paul Bogumil Sr. then drew up form SG-SSA-lO, Application for Widowers Insurance Benefits for PETER W. IANNACCONE to sign and return (even though Mr. Paul Bogumil Sr. had been informed. by me at that time that PETER W. IANNACCONE was declared an Incompetent Person, in 1960, and that I was the current Court appointed Successor Co Committee for PETER W. IANNACCONE) where stated on such SG-SSA-lO form certain information that appears to be in the adverse interest to PETER W. IANNACCONE, such as " I want Benefits beginning with October 1991" and "I do not want this application to be considered an application for Retirement Benefits on my own earnings record". Which PETER W. IANNACCONE did sign on April 16, 1992 four days prior to his death.

ELEVENTH: That on April 16, 1992, Mr. Paul Bogumil Sr., also drew up form SG-SSA-11, Request to be selected as payee, for Your Deponent to sign and return, where stated on such SG.-SSA-ll form certain Information that appears to he in the adverse Interest to William G. Iannaccone, such as " PETER IANNACCONE is not living with me". Although true PETER W. IANNACCONE was currently hospitalized, at that time, I had been directly responsible for his immediate care having been living with PETER W. IANNACCONE consistently since 1974 until his time in April 1992. Which I did sign at the specific request of Mr. Paul Bogumil Sr. on April 16, 1992.

TWELETH; That in April 1992 Mr. Paul Bogumil Sr. did provide to Your Deponent a computer—read-out where on such computer read-out it contains such information such as "Person contacted.. .Ms. Austin. Relationship. .CA-NECP.Date contacted 4/17/92 (April 17, 1992).Name of person preparing the report. Mr. Paul Bogumil Sr. Title-CR. Report.. Open Application..File destroyed in 9/84 (September 1984).The lump sum was paid in 2/79 (February l979). Lacking evidence to the contrary we have to assume that the application was adjudicated prior to 2/1/79 (February 1, 1979) and that it is open to all Benefits, which includes WIB (Widowers Insurance Benefits)."

THIRTEENTH: That on Aipril 23, 1992, three days after the death of my father PETER W. IANNACCONE both forms SG-SSA-10 and SG-SSA-ll were returned by me to Mr. Paul Bogumil Sr.

FOURTEENTH: That by letter dated May 29, 1992, Your Deponent, did receive an award from the SSA, Northeastern Processing Center, in the amount of $ 4,814.00 (FOUR THOUSAND-EIGHTHUNDRED-FOURTEEN

DOLLARS) that represents the Widowers Insurance Benefits due PETER W. IANNACCONE from October 1991 thru April 1992, based upon the second application made for PETER W. IANNACCONE, received by Mr. Paul Bogumil Sr. on April 23, 1992.

FIFTEENTH: That by letter dated October 5, 1992, to Mr. William F. McGurn, Manager, SSA, Northtown Plz. branch office, Your Deponent, did request that this case be reexamined and did outline my reasons for such request.

SIXTEENTH: That by letter dated December 28, 1992, Your Deponent, did receive notice confirming the initial decision, from the SSA, Northeastern Program Service Center, along with Reconsideration Determination, dated December 22, 1992, by Mr. Jerome Sabitino, Chief of Reconsideration Review Section, that stated " A computer record indicates a lump sum death payment was awarded to PETER IANNACCONE in March 1979 on the record of Mamie Iannaccone, who died October 15, 1978. The award certificate would have advised the claimant any other benefits required a separate application. There is no evidence that an application for widowers benefits was filed prior to April 1992". However, lacking any specific evidence, in support of the written above determination by Mr. Jerome Sabitino, based on the limited stated facts shown, no actual proof is given to prove that an application made by or for PETER W. IANNACCCNE, for Widowers Insurance Benefits, was not filed prior to April 1992.

SEVENTEENTH: That by letter dated February 16, 1993, to the SSA, Northeastern Program Service Center, Your Deponent, did request a hearing on this case and did outline my reasons for such a hearing.

EIGHTEENTH: That by letter dated March 29, 1993, to the SSA, Northtown Plz. branch office, with enclosed SSA form HA—5OI-U5, Your Deponent, did provide additional evidence to be considered at the proposed hearing and did request a formal hearing, at that time.

NINETEENTH: That by Notice of Hearing, Your Deponent, was advised that a hearing on this case would take place on July 13, 1993, at the Office of Hearing and Appeals, M&T Center, Buffalo, New York, before ALJ. F.Lambert Haley.

TWENTYTH: That on July 13, 14 and 15, 1993, a Hearing did take place at the Office of Hearings and Appeals, M&T Center, Buffalo, New York, before ALJ F.Lambert Haley. Present at the Hearing were: Mr. William F. McGurn, Manager, SSA Northtown Plz. branch office, on July 13, 1993. Eleanor Iannaocce, niece to PETER W. IANNACCONE and Court appointed Successor CoCommittee for PETER W.

IANNACCONE, on July 14, 1993. Mr. Paul Bogumil Sr., SSA Claims Representative, on July 15, 1993. And, myself, William G. Iannaccone, (Claimant and Court appointed Successor CoCommittee, and Administrator for the estate of PETER W. IANNACCONE having been granted Letters of Administration, by the Erie Co. Surrogates Court, on November 5, 1992,) on July, 15, 1993.

TWENTYFIRST: That Your Deponent, sent a letter dated December 2, 1993 to HON. F. Lambert Haley, Office of Hearings and Appeals, 3 Fountain Plz., Buffalo, New York, 14203-1496, that included an enclosed SSA form 2458-Report of Confidential Social Security Benefit Information, that stated: Beneficiary as PETER IANNACCONE. Social Security claim number as 712-14-2693. Name of person from whom a request for benefit Information was received as "Marie Law". The information provided by a Ms. Kelly, Authorized Official, SSA Northtown Plz. branch office, dated May 24, 1984 was "According to SS records no checks are paid to PETER IANNACCONE. He did not work under Social Security so no checks are payable."

TWENTYSECOND: That Your Deponent , in the same letter dated December 2, 1993, sent to HON. F. Lambert Haley, also included an enclosed transcript of the Deposition of Marie Law, Former Executrix of the Estate of Mamie Iannaccone, that shows that under questioning under oath Marie Law states that she has no knowledge of PETER or Mamie (Iannaccone) getting any (Social Security) benefits, and that, the SSA form 2458, dated May 24, 1984, signed by Ms. Kelly, was given to her (Marie Law) in 1984, at the SSA Northtown Plz. branch office, during the first time she made application to Social Security to see if PETER W. IANNACCONE was entitled to any benefits.

TWENTYTHIRD: That, Your Deponent, having serious concerns as to the truthfulness of Marie Law, in her Deposition under oath, taken on January 8, 1985, that she has no knowledge of PETER or Mamie Iannaccone getting any Social Security benefits, as well as, her true intent in visiting the SSA Northtown Plz branch office on May 24, 1984, as to her purported claim being to see if PETER IANNACONE was entitled to any Social Security Benefits, Your Deponent, having overwhelming reasons to allege that Marie Law's testimony under oath was perjurous, at that time, on January 8, 1985, Your Deponent, sent a actual copy of the original letter dated December 2. 1993, sent to HON. F. Lambert Haley, with complete enclosures, to the U.S. Attorney, Western District Office, by cover letter, also dated December 2, 1993,

addressed to Mr. Richard D. Kaufman, Assistant U.S. Attorney, 502 U.S. Court House, 68 Court Street, Buffalo, New York, 14202

TWENTYFOURTH: That Your Deponent also having previously requested to the U.S. Attorney, Western District Office, an investigation into the conversion and un-accountability by Marie Law as former "Custodian" of Social Security federal funds belonging to PETER W. IANNACCONE, and now to his estate, by outlining my reasons for such investigation, by my letter dated November 6, 1993, also sent to Assistant U.S. Attorney, Mr. Richard D. Kaufman, Western District Office, 502 US Court House, 68 Court Street, Buffalo, New York, 14202, Your Deponent, did receive a response from Mr. Richard D. Kaufman, Assistant U.S. Attorney, by letter dated December 6, 1993, that stated the matter concerning funds allocated by the Social security Administration has been referred to the Criminal Division of the U.S. Attorneys Western District Office.

TWENTYFIFTH: That Your Deponent, by letter dated June 15, 1994, sent to Mr. Patrick H. NeMoyer, U.S. Attorney, Western District Office, 502 U.S. Court House, 68 Court Street, Buffalo, New York, 14202, did again reinstate my request and reasons for an investigation into the conversion and unaccountability by Marie law as former "Custodian" of Social Security funds belonging to PETER W. IANNACCONE, and now to his estate, and that, Your Deponent, by telephonically contacting Ms. Kathleen Mehltretter, Chief of the Criminal Division, U.S. Attorneys Western District Office, on March 9, 1994 and on April 6, 1994, Your Deponent was informed by Ms. Kathleen Mehltretter, at that time, that the investigation into the conversion and unaccountability by Marie Law as former "Custodian" of Social Security funds belonging to PETER W. IANNACCONE, and now to his estate is pending

TWENTYSIXTH: That a Decision, rendered by ALJ F. Lambert Haley, dated August 18, 1994, was received by Your Deponent, concluding that under section 202 (j)(5) of the Act PETER'S application for Widowers Insurance Benefits should be deemed to have been "filed" as of the date of the claimants January 25, 1984 letter.

However, lacking any specific evidence, in support of the written Decision above based on the limited stated facts shown, no actual proof is given by ALJ F. Lambert Haley, to prove that an application for Widowers Insurance Benefits by or for PETER W. IANNACCONE was not actually filed prior to July 1983, at the time, in and around October 1978 when

PETER W. IANNACCONE actually became eligible to receive Widowers Insurance Benefits.

TWENTYSEVENTH: That in the evaluation, for his Decision, rendered August 18, 1994, ALJ F. Lambert Haley states " When the application for the lump sum death benefit was granted in March 1979, the notification of award would have included a so called " blanket close out statement" informing PETER that he was not entitled to any Social Security Benefits on Mamie's account. In the absence of a timely appeal of that notice, the blanket denial became "final" and effectively precluded reopening, at this late date, of any supposed applications asserted to have been filed at that time or earlier (20CFR 404.987 and 404.988)" However, lacking any specific evidence, in support of the above written evaluation by ALJ F. Lambert Haley, based on the limited stated facts shown, no actual proof is given to prove that PETER was not actually correctly informed (or the person acting as "custodian for PETER) that he (PETER) was entitled to other Social Security Benefits at that time around 1979, including Widowers Insurance Benefits, on Mamie's account. And even if incorrectly informed (as alleged by ALJ F. Lambert Haley) that he (PETER) was not eligible to receive any Social security Benefits, including Widowers Insurance Benefits, provides no evidence that a timely appeal of such notice (of alleged misinformation) was not actually filed

TWENTYEIGHTH: That in the evaluation, for his Decision, rendered August 18, 1994, ALJ F. Lambert Haley states " In October 1976, Mamie filed an application for disability insurance benefits (exhibit 23). That application was granted and she became entitled to benefits in October 1976. PETER filed (by or for him) an application for Retirement Insurance Benefits on his Own Social Security account in November 1976, at age 65, However, his application was denied based on a determination that he did not have sufficient covered earnings under Social Security to meet the insured status requirement necessary for entitlement to Retirement Benefits (exhibit 21 and 22)" However lacking any specific evidence in support of the above evaluation by ALJ F. Lambert Haley, based on the limited stated facts as shown, no actual proof is given to prove that when the application was filed by or for PETER W. IANNACCONE in November 1976 for Retirement Benefits, at age 65, that it was not correctly based on a determination as to PETER W. IANNACCONES eligibility to Retirement Benefits on his spouses Mamie Iannaccone account.

TWENTYNINETH: That In the evaluation, for his Decision, rendered on August 18 1994, ALJ F. Lambert Haley states " The Claimant has asserted that PETER should be found entitled to widows (widowers insurance benefits retroactive to the time he attained the age 65, in 1976. Although PETER and Mamie each filed separate applications for benefits on their own Social Security accounts in 1976, neither sought benefits for PETER as Mamie's spouse. Even if such an application had been filed, PETER was financially supported by his own Veterans pension and was not actually dependent on Mamie, as would have been required under the law at that time for entitlement to benefits as Mamie's spouse." The statement that the claimant has asserted that PETER should be found entitled to Widows (widower insurance benefits retroactive to the time he attained age 65, in 1976, is misunderstood. Your Deponent has had the understanding that the Social Security Benefits my father could have applied for in 1976 included Medicare and Retirement Benefits based upon his spouse Mamie's account earnings record. Also lacking any specific evidence, in support of the above evaluation by ALJ F. Lambert Haley, based on the limited stated facts as shown, no actual proof is given to prove that when PETER and Mamie filed separate applications in 1976, that neither correctly sought benefits for PETER as Mamie's spouse. And also ALJ F.Lambert Haley does not mention here that the Dependency Law was dropped prior to 1978 as described by SSA claims representative Mr. Paul Bogumil Sr. during his testimony under oath, given at the Hearing on July 15, 1993. Or the possibility that the Dependency Law had been circumvented in view of the fact that PETER W IANNACCONE was a 100% disabled veteran, whom was declared an Incompetent Person, in 1960, therefore, a dependent person, in 1976.

THIRTYTH: That pertinent, in part, to Your Deponents arguments herein made is the computer read-out showing Report of contact of Ms. Austin at the SSA Northeastern Program Center, dated April 17, 1992, by SSA claims representative Mr. Paul Bogumil Sr. that Reports..Open Application..File destroyed in September 1984. The lump sum was paid in February 1979. Lacking evidence to the contrary we have to assume that the application was adjudicated prior to February 1979 and that it is open to all benefits, which includes Widowers Insurance Benefits. Although this Report of contact, dated

April 17, 1992, of Ms. Austin, by Mr. Paul Bogumil Sr., was submitted and entered into evidence, in the case file prior to the Hearing on July 13, 1993, as an enclosure with my October 5, 1992 letter requesting a reexamination of this case, sent to Mr. William F. McGurn, SSA Manager, Northtown Plz. branch office (exhibit *12), and* where (exhibit 12) was referred to by me at the Hearing of Mr. William F. McGurn on July 13 1993, and where such Report of contact of Ms. Austin, dated April 17, 1992 was reintroduced by me specifically Into evidence during the Hearing of Mr. Paul Bogumil Sr. on July 15, 1993, and where (exhibit 12) was again referred to by me, during my testimony given under oath at the continued Hearing on July 15, 1993, such Report of contact of Ms. Austin, dated April 17, 1992 is not specifically identified on the list of exhibits provided to me along with the ALJ Decision, dated August 18, 1994, so such Report of contact of Ms. Austin, dated April 17, 1992 is hereby attached to this Complaint. And it is this Report of contact of Ms. Austin, dated April 17, 1992, that Your Deponent, in part, has derived a legal opinion that the Onus, as it presently stands, for damages to the Plaintiff PETER W. IANNACCONE, and now to his estate, for Social Security Benefits due to his estate, payable to him prior to July 1983, rests with the Primary Defendant in this action(s) the Secretary of Health and Human Services due to the destruction of the paper file in September of 1984, where an active claim was pending In the interest of PETER W. IANNACCONE.

THIRTYFIRST: That Your Deponent did Appeal the Decision rendered by ALJ F. Lambert Haley, dated August 18, 1994, by Appeal letter dated October 10, 1994 (with complete enclosures consisting of approx. 152 pages) personally provided by me to the SSA Appletree Mall branch office, Cheektowaga, New York and was received by SSA claims representative Mr. Doug Martin on October 13, 1994. And that I also did file SSA form HA-520-U5, Request for review of Hearing Decision at that time on October 13, 1994. And that Your Deponent did file a supplemental SSA form HA-520-U5, Request for review of Hearing Decision, on October 17, 1994, with the SSA Appletree Mall branch office, received by SSA claims representative Mrs. Taylor on October 17, 1994.

THIRTYSECOND: That Your Deponent did receive a Notice of Action of Appeals Council on Request for Review, dated March 9, 1995 from the Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA.22041-3255, that denied my request for a review of the ALJ Hearing Decision,

dated August 18, 1994, by the Appeals Council.

THIRTYTHIRD: That by letter dated March 17, 1995, Your Deponent, requested an extension of time to commence a Civil Action by filing Summons and Complaint, to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church VA., 22041-3255.

THIRTYFOURTH: That Your Deponent did receive Notice of Order of Appeals Council extending time to file Civil Action, until July 12, 1995.

THIRTYFIFTH: That Your Deponent, by filing Summons and Complaint, thereby commencing a Civil Action, requests his right to a Court review of the ALJ Hearing Decision, dated August 18, 1994, as provided for in section 205 (g) of the Social Security Act, as amended (42 USC 405 (g)).

THIRTYSIXTH: That the acts and omissions of the Primary Defendant (1) Secretary of Health and Human Services, as hereby set forth, were wholly and solely by virtue of the negligence of the Primary Defendant (1) with no want of care on the Plaintiffs behalf contributing thereto.

THIRTYSEVENTH: That as a result of the Primary Defendants (1) Secretary of Health and Human Services negligence in the premisis, the Plaintiff, by his estate Administrator and Claimant in this action, verily believes that the estate of PETER W. IANNACCONE has sustained damages to the detriment in the sum of $50,000.00 (FIFTYTHOUSAND DOLLARS) inclusive of Widowers Insurance Benefits payable for PETER W. IANNACCONE from October 1978 thru July 1983, and any Retirement Benefits payable to PETER W. IANNACCONE, prior to 1978, inclusive of the earnings account of his spouse Mamie Iannaccone. And where such given sum of $50,000.00 (FIFTYTHOUSAND DOLLARS) does exclude compensation already provided to the Plaintiff, by the Social Security Administration, by Order of the favorable Decision rendered by ALJ F. Lambert Haley, dated August 18 1994 for the sum of $66,795.00 (SIXTYSIXTHOUSAND-SEVENHUNDRED-NINETYFIVE DOLLARS) for Widowers Insurance Benefits due PETER W. IANNACCONE, and now to his estate, from July 1983 thru April 1992.

THIRTYEIGHTH: That the damages to the Plaintiff as a result of the Primary Defendants (1) Secretary of Health and Human Services negligence, have not been fully assed as there is a need for Discovery proceedings before this Court, which will assist in determining the full nature and extent of Plaintiffs damages. Accordingly, the Plaintiff is unable to

ascertain the total amount of damages due. The Plaintiff therefore reserves the right to amend his ad damnum clause

AS AND FOR A SECOND CAUSE OF ACTION

THIRTYNINETH: The Plaintiff, by his Administrator and Claimant in this action repeats and realleges each and every allegation contained in Paragraphs "FIRST" thru and including"THIRTYEIGITH" above, both inclusive, as though the same were herein fully and at length set forth.

FORTYTH: That by Your Deponents best information and belief the Secondary Defendant (2) Marie Law, former "Custodian" of Social Security funds payable for PETER W. IANNACCONE is currently at least a partial or full resident of the State of Florida and within the United States boundary.

FORTYFIRST: That Marie Law, at the time of the alleged act of conversion and unaccountability for the federal Social Security funds payable for PETER W. IANNACCONE, as former "Custodian" between 1978 and 1983, therefore a breach of Fiduciary Duty, was a resident of the County of Erie and State of New York, having set up residence, at that time, of the alleged offense, at 9060 County Road, Clarence, New York.

FORTYSECOND: That at all times hereinafter mentioned the Secondary Defendant (2) Marie Law's second last attorney representing In the Matter of the Judicial Settlement of the Accounts of Marie Law, former Executrix of the Estate of Mamie Iannaccone, still pending, was Attorney Mr. Charles D. Wallace, an attorney licensed to practice in the State of New York and upon information and belief is a resident of the County of Erie and State of New York, having an office listed at 5922 Cole Road, Orchard Park, New York.

FORTYTIIIRD: That at all times hereinafter mentioned the Secondary Defendants (2) Marie Laws first last attorney representing her in the Matter of the Judicial Settlement of the Accounts of Marie Law, former Executrix of the Estate of Mamie Iannaccone, still pending, was Mr. John R. Streb, an attorney licensed to practice in the State of New York and upon information and belief is a resident of the County of Erie and State of New York, having an office listed at 2953 Elmwood Avenue, Buffalo, New York.

FORTYFORTH: That Marie Law as former " Custodian " for the Social Security funds payable for PETER W. IANNACCONE, from 1978 thru 1983 was not the closest immediate relative to, (being a sister-in-law to PETER W. IANNACCONE) not living with nor not directly responsible for the immediate care of PETER W. IANNACCONE, at that time.

FOURTYFIFTH: That Marie Law as former "Custodian" for the Social Security funds payable for PETER W. IANNACCONE, from 1978 thru 1983 was not a Court appointed fiduciary or Court appointed Guardian for PETER W. IANNACCONE (Incompetent Person), at that time.

FOURTYSIXTH: That Marie Law as former "Custodian" for the Social Security funds payable for PETER W, IANNACCONE, from 1978 thru 1983 and as acting Executrix of the Estate of Mamie Iannaccone in 1979, should be held accountable for any funds accumulated for the benefit of PETER W. IANNACCONE, that were paid out by the Social Security Administration for PETER W. IANNACCONE anytime prior to October 1978, and then converted to Marie Law as Executrix of the Estate of Mamie Iannaccone.

FOURTYSEVENTH: That Marie Law as former "Custodian" of Social Security funds payable for PETER W. IANNACCONE from 1978 thru 1983 did convert those funds for her Own use, rather than the intended beneficiary PETER W. IANNACCONE, and failed to account for such funds thereby breaching her fiduciary duty as former "Custodian".

FORTYEIGHTH: That the damages have not been fully assessed as there is a need for Discovery proceedings, before this Court, which will assist in determining the full nature and extent of damages. Accordingly the Plaintiff, by his Administrator and Claimant in this action, is unable to ascertain the total amount of damages due. The Plaintiffs estate therefore reserves its right to amend the ad dam nun clause.

FORTYNINETH: That as a result of the breach of fiduciary duty by Marie Law as former "Custodian' the Plaintiff's estate has sustained damages to the detriment in the sum of ~50,000.00 (FIFTYTHOUSAND DOLLARS).

FIFTYTH: That by the destruction of the paper "file'" in September of 1984, by the Social Security Administration, as stated in the SSA computer readout, provided by SSA claims representative, Mr. Paul Bogumil Sr., to Your Deponent in April 1992, showing Person contacted. Ms. Austin-CA-NEPC..Date of contact..Aprll 17, 1992..Report..Open Applicatlon..File destroyed September 1984.The lump sum was paid in February 1979.Lacking evidence to the contrary we have to assume that the application was adjudicated prior to February 1, 1979 and that it is open to all Benefits, which includes Widowers Insurance benefits, the Social Security Administration destroyed the paper "flle" that would have provided the specific evidence pertaining to prior applications

made by or for PETER W IANNACCONE for Retirement benefits in November of 1976, at age 65, and Widowers Insurance Benefits around 1978, that would have supported Your Deponents claims herein made, including that when PETER W. IANNACCONES application for Retirement Benefits was made by or for him in November of 1976, at age 65, it was correctly based on his own earnings account record (Railroad Retirement Pension) and correctly based on his spouse Mamie Iannaccone's earnings account record, as well. And that when PETER W. IANNACCCNES application for Widowers Insurance Benefits was made by or for him, around 1978, it was correctly based on his own earnings record (Railroad Retirement Pension) and correctly based on the earnings record of his spouse Mamie Iannaccone, as well. And that Marie Law as former "Custodian" was in the control of such funds payable to PETER W. IANNACCONE by the Social Security Administration, for Widowers Insurance Benefits, from 1978 of October, thru July 1983, and including those SSA Retirement Benefit funds, payable for PETER W. IANNACCCNE from 1976, at age 65, thru 1978, that may have been transferred to Marie Law, in 1979, as former Executrix of the Estate of Mamie Iannaccone, still pending.

FIFTYFIRST: That Your Deponent, has derived a legal opinion that the Onus for the recovery of money damages sought by the Plaintiff, rests with the Primary Defendant (1) Secretary of Health and Human Services, due to negligence, where liability is established for allowing SSA payments, payable for PETER W. IANNACCONE, to be made, without proper monitoring, from 1978 thru 1983, under the direction and control of the former "Custodian" Marie Law whom was not a Court appointed fiduciary or a Court appointed Guardian of PETER W. IANNACCONE, (an Incompetent Person).Nor was Marie Law an immediate relative to, living with, or in the direct care of PETER W. IANNACCONE. And that the Social Security Administration destroyed the paper "file" in September of 1984, that would have provided the specific evidence pertaining to the prior application made by or for PETER W. IANNACCONE in November 1976 and 1978 or vicinity thereof, that would have supported the claim herein made by Your Deponent, of Marie Laws "Custodianship".

WHEHEFORE: The Plaintiff, by his Administrator and Claimant In this action, demand judgment against the Defendants in the sum of $50,000.00 (FIFTYTHOUSAND-DOLLARS), with interest thereon, reasonable attorney fees, the costs and disbursements of this action, and requests that Discovery proceedings take place, before this Court, to compel

the Defendant (1) Secretary of Health and Human Services, as custodian of the SSA records being sought by the Plaintiff in this action, to provide, or cause to be provided, to Your Deponent, as having to act as Attorney pro se in this action, all complete available records pertaining to the accounts of PETER W. IANNACONE (712-14-2693) and Mamie Iannaccone, spouse of PETER W. IANNACCONE (126-05-2576). including all those records kept on computer file, including payments made, to whom made, and address sent. including those records kept at the SSA Payment Center, located In Jamaica, New York. That Your Deponent, as Attorney pro se reserves his right to serve a subpoena on the Primary Defendant (1) Secretary of Health and Human Services, as custodian to those records being sought by the Plaintiff in this action, to compel the release of those SSA records as described herein and above, to be provided, or cause to be provided, under the sanctity of oath. That a true copy of the authentic written transcript, and identified a such, of the Hearing that took place July 13, 14 and 15, 1993 before ALJ F Lambert Haley, at the Office of Hearing and Appeals, 3 Fountain Plz., Buffalo, New York, 14203-1496, be provided to Your Deponent, and such other and further relief as to this Court deems just and proper.

DATED: Buffalo, New York July 11, 1995
Yours, etc.
William G. Iannaccone
Attorney pro se for Plaintiff
119 Ellen Drive
Cheektowaga, New York
214 (716) 632-1608

Sworn to before me this *11* day of July 1995
personally before me appeared William G. Iannaccone

S/S William G. Iannaccone

S/S DIANEL FULLER
Notary Public
My Commission Expires 2/5/96

CLAIMANT PETER IANNACCONE
APPLICANT (IF DIFFERENT) WILLIAM G. IANNACCONE.
ADDRESS: 119 ELLEN DRIVE
CITY: CHEEKTOWAGASTATE: NY ZIP: 14225 COUNTRY:
PHONE: 716 632 1608 INFO: HOME ____ PHONE:
PRINT APPLICATION (X)~ _ 041692 041692

ISSUE	REQ	F/UP	F/UP	TICKLE	REC	REMARKS
SURSPO	041692				042392	PJB D1091SEE
DEATH					041692	MBR
AGE					041692	MBR
MAR					041692	MC
MILSER					041692	HIS
PAYEE	041692				042392	

ADDITIONAL ISSUES(Y/N) Y REMARKS (Y/N): ___

MCS 3.3 TRANSFER TO:WORKSHEET CONTINUATION DW02
NH 126052576 MAMIE IANNACCONE
CL 712142693 PETER IANNACCONE
CLAIMANT: PETER IANNACCONE UNIT: F54000 FO: 143
APPLICANT (IF DIFFERENT): WILLIAM G IANNACCONE
ADDRESS: 119 ELLEN OR
CITY: CHEEKTOWAGA STATE: NY ZIP: 14225 COUNTRY:
PHONE: 716 632 1608 INFO: HOME PHONE INFO:

ISSUE	REQ	F/UP	F/UP	TICKLE	REC	REMARKS
E/R	041692	042392		051292		
C/ORD	041692				042392	COURT ORDER SHOWING INCOMPETAN
DTH	042392		042892			DTH CERT DOD 4 -20-92
REL	042392		042892			BC FOR U/P
1724					042392	U/P

ADDITIONAL ISSUES (Y/N):___ REMARKS (Y/N): ___

MCS 2.5 TRANSFER TO: REPORT OF CONTACT
NH 126052576 MAMIE IANNACCONE
CL 712142693 PETER IANNACCONE
PERSON CONTACTED: MS. AUSTIN
RELATIONSHIP/TITLE: CA NEPC
HOW CONTACTED: 11. PHONE 2. D0/B0 3. OTHER SPECIFY
NAME OF PERSON PREPARING REPORT: PAUL BOGUMIL SR
TITLE: 2. 1. OS 2. CR 3. SR 4. CDC5.
OTHER SPECIFY: _____
REPORT: OPEN APPLICATION
FILE WAS DESTROYED IN 9/84. THE LUMP SUM WAS PAID IN 2/79. LACKING EVIDENCE TO THE CONTRARY WE HAVE TO ASSUME THAT THE APPLICATION WAS ADJUDICATED PRIOR TO 2/1/79 AND THAT IT IS OPEN TO ALL BENEFITS. WHICH INCLUDES WIB.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

ESTATE OF PETER IANNACCONE, Deceased, by WILLIAM G. IANNACCONE, ADMINISTRATOR and CLAIMANT, pro se,

FILED AUG 12 1996

Plaintiff,

V.

(1) SHIRLEY S. CHATER, COMISSIONER Of SOCIAL SECURITY, and
(2) MARIE LAW, Former Custodian of SSA Funds Payable for PETER IANNACCONE

Defendants. 95-CV-555 (S)

NOTICE OF MOTION AND MOTION FOR NONAFFIRMANCE OF COMMISSIONER'S DETERMINATION IN RESPONSE TO COMMISSIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS AND, TO ALLOW PLAINTIFF'S PROPOSED FILING OP MOTION FOR DISCOVERY AND/OR PRODUCTION OF DOCUMENTS UNDER FED.R.CIV.P.26-37.

PLEASE TAKE NOTICE that the Plaintiff, the Estate of PETER IANNACCONE, deceased, by William G. Iannaccone, Administrator, Claimant and attorney, pro se, will move, and hereby does move this Honorable Court (Honorable William M. Skretny, United States District Judge) at the United States Courthouse, 68 Court Street, Buffalo, New York, in response to Rule 12 (c) of the Fed.R.Civ.P, for an Order granting Plaintiff's Motion for Non-affirmance of Commissioner's Determination in response to Commissioner's Motion for Judgment on the Pleadings. And, to allow Plaintiff's proposed filing of Motion for Discovery and/or Production of Documents under Fed.R.Civ.P. 26-37, and for such further relief as this Court may deem just and proper.

This Motion is based upon all pleadings filed to date and is supported by the Memorandum of Law submitted herewith, with supporting Affidavits by SSA Rep. Miss Keller and William G. Iannaccone.

DATED: Cheektowaga, New York, August 9, 1996.

1

Respectfully submitted by
WILLIAM G. IANNACCONE
119 Ellen Drive
Cheektowaga, New York
14225 -1214

s/s William G. IANNACCONE
Attorney, pro se

cc. Mary E. Fleming, Esq.
U.S. Attorneys Office

John R. Streb, Esq.
2953 Elmwood Avenue
Kenmore, N.Y. 14217-1229

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

ESTATE OF PETER IANNACCONE, Deceased,
by WILLIAM G. IANNACCONE, ADMINISTRATOR and
CLAIMANT, pro se,

Plaintiff,

V.

(1) SHIRLEY S. CHATER, COMMISSIONER of SOCIAL SECURITY, and

(2) MARIE LAW,
Former Custodian of SSA funds payable for PETER IANNACCONE,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR NONAFFIRMANCE OF COMMISSIONER'S DETERMINATION IN RESPONSE TO COMMISSIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS, AND, TO ALLOW PLAINTIFF'S PROPOSED FILING OF MOTION FOR DISCOVERY AND/OR PRODUCTION OF DOCUMENTS UNDER FED. R. CIV. P. 26-37 WITH SUPPORTING AFFIDAVITS BY SSA REP. MISS KELLER AND WILLIAM G. IANNACCONE.

PRELIMINARY STATEMENT

Plaintiff, the Estate of PETER IANNACCCNE, Deceased, by William G. Iannaccone, Administrator and. Claimant, pro se, submitts this memorandum in support of his motion for nonaffirmance of Commissioner's determination in response to Commissioner's motion for judgment on the pleadings. And, to allow Plaintiff's proposed filing of motion for discovery and/or production of documents under Fed.R.Civ.P. 26-37. This court has jurisdiction under 42 U.S.C. sec. 405(g).

That no actual proof is provided to serve as the DEFINATE EVIDENCE, In the " ALJ " evaluation for the decision, dated August 18, 1994, that when Mamie filed an application for SSA Disability Insurance benefits in October 1976, that was granted, and when an application for Social Security Insurance benefits was filed for PETER, in November 1976, that neither correctly soughht benefits on Mamie's account, for PETER (TR19), (TR 21).

That the " ALJ " evaluation does not mention that the Dependency Law was omitted in March 1977, (TR 97-98), repeated on (TR 340-41), allowing for a modification of the

eligibility requirements for PETER'S application for Social Security Insurance benefits, or offer any proof that PETER did not prove dependency in November 1976, since, although Mamie's income is reported to be shown on the Social Security Administration computer system, Peter's income consisting of V.A. Disability benefits is not shown, to ever have been reported.
That the " ALJ " evaluation offers no DEFINATE EVIDENCE that when the application for the lump-sum death benefit was filed for PETER, soon after the death of Mamie, whom died fully insured, on October 15, 1978, that an application for Widower's Insurance benefits, for PETER, was not correctly filed, at that time (TR 19),(TR 159),(TR 192).

Page citations are to the transcript of the administrative record filed by the Commissioner as part of her answer.

The Social Security Administration has jurisdiction to inquire into claims involving misuse of benefits paid under the "Act " and is relevant on the issue of PETER'S retroactive entitlement to Social Security benefits.

Therefore, Plaintiff's motion for nonaffirmance of the Commissioner's determination. And, to allow Plaintiff's filing of motion for discovery and/or production of the documents under Fed.R.Civ.P. 26-37, for the obtainment of the DEFINATE EVIDENCE, must be granted.

PROCEDURAL HISTORY

Plaintiff's request to file application for Peter, was denied, as he was incorrectly informed at the SSA Northtown Plz. office, in 1983 and 1984.that PETER, was not entitled to Medicare as a % 100 disabled veteran, therefore, only entitled to care offered by the Veterans Administration medical facility. And, also at that time, Plaintiff was not correctly informed that PETER was entitled to receive Widower's Insurance benefits. (TR 123-24), (TR 149—67), (TR 179-81), (TR 248-50), (TR 294-95),(TR 302-08),repeated on (TR 351-52), and on (TR 376-78).

That during the Deposition of Marie Law, as former Executrix of the Estate of Mamie Iannaccone, having taken place on January 8, 1985, where issue of Marie Law's knowledge of PETER'S eligibility to Social Security benefits was being questioned by attorney David C. Laub, whom represented Horace A. Gioia, PETER'S committee, Marie Law submitted. Social Security form 2458, " Report of Confidential Social Security benefit Information ", provided to Marie Law,

as " Custodian " by Ms. Kelly, SSA claims representative at the Northtown Plz. branch office, dated May 24, 1984, where such information provided, on such Social Security form, did not correctly state that PETER was eligible for' Widower's Insurance benefits or Medicare coverage. (TR 280). Marie Law, stated under oath, that that day of May 24, 1984, was the first time she ever made application to the Social Security Administration for Social Security benefits available for PETER. (TR 283-86)

Plaintiff was first correctly informed that PETER was entitled to Medicare coverage and Widower's Insurance benefits, during a subsequent inquiry at the SSA Northtown Plz. branch office, on April 16, 1992, four days prior to PETER'S death, on April 20, 1992, and then proceded to file for PETER, for such benefits on April 23, 1992. (TR 43-45),(TR 48),(TR 89-96),(TR 102-03),(TR 105),(TR 112),(TR 125-28),(Tr 129-32), (TR 150),(TR 179-80),(TR 186-87),'(TR 230),(TR 237) (TR 248-49),(TR 264), repeated on (TR 319-20)., (TR 332),(TR 337-40).,(TR 342-43), and on (TR 377).

Plaintiff, at that time in April 1992, while at the SSA Northtown Plz. branch office, was provided several SSA computor read-outs, by SSA claims representative Paul Bogumil Sr., whom was a witness before the "ALJ " on July 15, 1993. (TR 91), (TR 98-102),(TR-191),(TR 194-99),repeated on (TR 338),(TR 341-42), including " Report of Contact" dated April 17, 1992, that states " Open Application. File (application file) was destroyed in September 1984. The Lump Sum was paid in February 1979. Lacking evidence to the contrary we have to assume that the application was adjudicated prior to February 1, 1979 and that it is open to all benefits which includes Widower's Insurance benefits " (TR 234).

The April 23, 1992 application was approved, but authorized payment of benefits only since October 1991, six months prior to that date. (TR 135). This determination was affirmed on reconsideration (TR 138-41). Plaintiff then requested a hearing, which took place on July 15, 1993 (TR 30-54), repeated on (TR 314-24), July 14, 1993 (TR 55-85), repeated on (TR 325-36), and July 15, 1993 (TR 86-124), repeated on (TR 346-56).

The administrative law judge ("ALJ") whom presided over the hearings reviewed the "immediate " record before him (TR 21), and referred to Exhibits 21 and 22 (TR 193-98) in his interpretation of the so-called substantial evidence, that PETER'S November 1976 application at age 65 for Social Security Insurance benefits was filed incorrectly on PETER'S

account only, which are reports generated by the SSA Northtown Plz. branch office, and which is not DEFINATE EVIDENCE, to formulate his decision, on August 18, 1994, that PETER was deemed to have filed an application on January 25, 1984, due to misinformation provided by the Social Security Administration after Plaintiff's letter dated January 25, 1984, under 42 U.S.C. S 402(j)(5), 20 CFR sec 404.633, and directed the agency to redetermine the past-due benefits to which he was entitled (TR 25). Plaintiff filed an Appeal, dated October 10, 1994 (TR 302-78). The Appeals Council denied Plaintiff's request for review on May 9, 1995 (TB 10-11), repeated on (TR 12-13). Plaintiff filed his complaint in this action, on July 11, 1995.

ISSUE

The only issue to be determined by the Court is whether the Social Security Administration benefit payment records will provide the DEVINATE EVIDENCE to prove that actual applications for Social Security Insurance benefits were correctly filed for PETER prior to the date of the deemed application, being January 25, 1984, that resulted in the misuse of SSA benefit payments made for PETER under the "Act " prior to June 1983.

STATEMENT OF FACTS

PETER IANNACCONE was born on March 2, 1911 and Mamie Iannaccone was born March 30, 1918 (TR 115), (TR 191), repeated on (TR 348). They were married in 1938 (TR 57), repeated on (TR 326). PETER sought and obtained a legal separation from Mamie, with court restraining order, in 1944, in the County of Erie, but did not divorce (TR 58-59), repeated on (TR 326-27), (TR 365). PETER was unwillfully confined, an action initiated by his spouse, to the Canandaigua Veteran's Administration psychiatric facility from 1945 to 1968 (TR 60), repeated on (TR 327). PETER was declared an Incompetent Person, in 1960, by the Erie County Court, an action initiated by his spouse, but no committee was appointed for him, at that time (TR 41),(TR 150),(TR 180),(TR -189), repeated on (TR 319), and on (TR 365). PETER was entitled to %100 Veteran's Disability payments, since 1945, that were received by Mamie, as his fiduciary (TF 69) (TR 151), repeated on (TR 330).

Mamie filed an application for SSA Disability Insurance

and was found to be entitled to such benefits as of October 1976 (TB 198). PETER'S application was filed for him, for Social Security Insurance benefits in November 1976, at age 65 (TR 191),'. Mamie died on October 15, 1978. In February 1979, or just prior to that date, an application was filed for PETER for the lump-sum death benefit on Mamie's account (TR 98-99), (TR 159). The lump-sum death benefit was paid for PETER in March 1979 (TR 199).

On January 11 and February 2, 1993, Plaintiff wrote to the Social Security Northtown Plz, branch office, in Amherst, New York, requesting that an investigation, be made, into the Social Security benefits available for PETER, and provided PETER'S Social Security number 712-14-2693 and date of birth 3/2/11, making him 72 years of age, at that time (TR 155-57). William F. McGurn, the SSA Northtown Plz. district manager, informed Plaintiff, by letter dated February 17, 1983, that there were no benefits being paid for PETER under his Social Security number, and that, If benefits are being paid to someone on PETER'S behalf, under another name or Social Security number, with the provision of additional informatIon, the agency will investigate further (TR 158).

On' January 25, 1984, Plaintiff wrote to William F. McGurn, at the SSA North-town Plz. branch office, stating that PETER had a spouse, Mamie Iannaccone, gave Mamie's Social Security number 126-05-2576, as well as Peter's Social Security number with his date of birth, and indicated that Mamie was deceased as of October 15, 1978 (TR 160-62). An undated letter, signed by Mr. McGurn, in response, indicated again that PETER was not receiving any type of SSA benefits based on his own account (TR 163). Plaintiff wrote to Mr,.McGurn, on February 7, 1984, again providing PETER and Mamie's SSN's, stating that Mamie was deceased as of October 15, 1978.. (TB 42), (TR 164-66). On February 8, 1984, Mr. McGurn wrote to Plaintiff, that SSA had made a through investigation of the matter, and that, there was no more information that could or will be provided regarding PETER IANNACCONE (TB 167).Mr. McGurn who testified as a witness, before the " ALJ " on July 13, 1993, and whom, stated under oath that he did not review the files pertaining to Mamie Iannaccone or PETER IANNACCONE, prior to giving such testimony (TR 33), repeated on (TB 315), was unable to explain why, having been made aware of the information in Plaintiff's letters, he did not indicate that PETER was eligible for Widower's Insurance benefits and Medicare coverage, in his February 8, 1984 reply (TR 44-45), repeated on (TR 320-

21).

]Horace A. Gioia, a non-family member to PETER was appointed the Committee for PETER, by order dated June 13, 1984, by the Surrogate as Acting Supreme Court Justice, soon after the discovery, by Plaintiff, in early 1984, that PETER had been declared an Incompetent Person, in 1960, and that no committee was appointed, at that time (TR 188-90), (TR 365). That by Petition dated April 13, 1988, Plaintiff, petitioned the Surrogate, as Acting Supreme Court Justice to substitute Horace A. Gioia, as Committee, to a family member of PETER'S, for proper Committeeship, before trial, in the Matter of the Final Accounting of Marie Law as former Executrix of the Estate of Mamie Iannaccone, asserting that Horace A. Gioia and David C. Laub, attorney for the Committee had. failed to properly investigate and examine Marie Law. That the Surrogate, reserved his decision for the substitution of Horace A, Gioia, as Committee, to a family member of PETER'S for Committeeship, until after trial of Marie Law, on June 13, 1988.

On October 20, 1989, after the trial in the Matter of the Final Accounting of Marie Law as former Executrix of the Estate of Mamie Iannaccone, which took place on June 13 and June 14, 1988, the Surrogate as Acting Supreme Court Justice appointed Plaintiff and Eleanor Iannaccone as Cocommittee for PETER (TR 142-45), repeated on (TR 169-72). Eleanor Iannaccone, niece to PETER was a witness before the " ALJ " on July 14, 1993 (TR 53-85), repeated on (TR 325-36).

Since Plaintiff had been misinformed in 1983 and 1984, during his personal visits to the SSA Northtown Plz. branch office, that PETER, was not eligible for Medicare, even though he was over 65 years of age, due to him being a % 100 disabled veteran, eligible for Veteran Administration medical care only, (TR 123-24), repeated on (TR 351-52). And Plaintiff, knowing of PETER'S expressed severe adversity to the Veteran Administration medical facilities (TR 67-69), repeated on (TR 329-30), and on(352) had PETER hospitalized in the Millard Fillmore Suburbon Hosp., in 1992,. (tr. 352), and made application, in 1992, to the Erie County Dept. of Social Services for PETER'S eligibility to Medicaid. Plaintiff was informed by the Erie Co. Dept. of Social Services claims representative, in 1992, that such information provided by the Social Security Admin. in 1983 and 1984, that PETER is not eligible for Medicare due to being a % 100 disabled veteran, is incorrect, and If that is there claim, have SSA put it into writing (TR 150),(TR 352). Plaintiff, immediately visited the SSA Northtown Plz. branch office on April 16, 1992, and

Plaintiff, after having given the SSA claims representative, at the reception desk, PETER'S Social Security number and age (81) was again misinformed that PETER was not eligible for Medicare, due to being a % 100 disabled veteran, eligible for V.A. care only, and that, he should be placed into a Veteran's Administration medical facility. Plaintiff then requested that the SSA claim of PETER'S ineligibility to Medicare be put into writing. Only then was Plaintiff referred to SSA claims representative Mr. Paul Bogumil Sr., whom first correctly informed Plaintiff that PETER was eligible for Medicare, since 1976, at age 65, and Widower's Insurance benefits, as of October 1978 (TR 123-24), repeated on (TR 351-52). PETER died on April 20, 1992. Plaintiff was subsequently appointed Administrator of PETER'S estate in November of 1992 (TR 252).

ARGUMENT

A. Regulatory Standard

Husband's insurance benefits are available to the husband of an insured person who is entitled to old-age or disability benefits if the husband has filed an application for husband's insurance benefits, has attained age sixty-two, and is not entitled to old-age or disability benefits, or is entitled to old age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the individual's primary insurance amount. 42 U.S.C. sec. 402. (c)(1).

Widower's insurance benefits are available to the widower of an individual who died fully insured if the widower has not remarried, has attained the age of sixty years, and has filed an application for such benefits. 42 U.S.C. sec. 402(f). In the case of an individual who is at least sixty-five years of age entitlement to widower's insurance benefits may commence up to six months before the application for benefits was filed, provided that all the requirements for entitlement, other than filing of the application were met at such earlier time. 42 U.S.C. sec. 402(j)(1).

To be considered for a claim for benefits, an application must be filed. 20 C.F.R. sec. 404.603. An application for monthly benefits under Title II of the Act generally must be filed on a from provided for such purpose and signed by the applicant. 20 C.F.R. sec. 404.611. A court appointed representative may file for an Incompetent Person 20 C.F.R. sec. 404.612.

Marie Law, was not a court appointed representative for PETER, an Incompetent Person, nor was Marie Law ever living with, or ever responsible for the care of PETER. Plaintiff, the closest living relative to PETER, was living with PETER, since 1975 through 1992, and was responsible for his care (TR 113-14)

Marie Law's claim under oath that May 24, 1984, was the first time she ever made application to the Social Security Administration for PETER'S eligibility to SSA benefits (TR 283-86) is defiantly questionable, since Plaintiff did not file application for the lump-sum death benefit, around February, 1979, for PETER, (TR 199) and since PETER, due to the nature of his disabilities would have been unable to file on his own, the person most rationally to have filed for the lump-sum death benefit, for PETER, on Mamie's account, would have been Marie Law..

3. Scope of Review

Plaintiff's determination is that prior application for Social Security benefits were correctly made for PETER, by or for him, by him limited to his signature, prior to January 25, 1984, that benefits were paid out under " the Act" for PETER IANACCONE, on a monthly basis prior to June 1983, and that, Marie Law, as former SSA Custodian (Tr. 280) for PETER IANNACCONE, and as former Executrix of the Estate of Mamie Iannaccone (TR 200),(Tr. 202),(Tr. 210),(Tr. 281), was in the control of such SSA benefits intended for PETER IANNACCONE, and failed to account for such payments, even when required under oath, to do so (Tr. 278-93),Determination made in; (Tr. 70),(Tr. "73-75),(Tr. 79-80),(Tr. 97-98),(Tr. lOO),(TR. 114),(Tr. 120),(Tr. 148),(Tr. 150-5l),(Tr..155),(Tr. *160-62),* (Tr. 165-66),(Tr. 180-8l),(Tr. 216),(Tr. 235—36),(Tr.237),(Tr. 249),(Tr. 28-79),(Tr. 283-86), (Tm, 302-08); Repeated on (Tr. 331-34),(Tr. 340-41),(Tr.348), (Tr. 350),(Tr. 353), And. on (Tr. 364). Also in Plaintiff's complaint paragraphs: *(21-25)* and (40-5l).

The evidence supporting Plaintiff's determination is substantial in the context of a Social Security case, as defined by the Supreme Court as being "more than a mere scintilla " and as that evidence which " a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) *(* quoting Consolidated Edison Co. v. NLRB, 3O5 U. S. 197, 229 (1938).

Defendant, the Commissioner, makes the erroneous interpretation, of the evidence on record, that the actual SSA

applications filed for Peter, prior to the deemed application date of January 25, 1984, were filed incorrectly, only on his account, and not on Mamie's account, and erroneously claims that the Commissioners determination is supported by substantial evidence.

In this particular case where the evidence, on record, is being subjected to more than one interpretation, Plaintiff, offers to the Court a legal remedy to this dispute, being his proposed motion for discovery and/or production of the documents under Fed.R.CIV.P. 26-37, for the obtainment of the DEFINATE EVIDENCE, that would provide proof beyond a reasonable doubt, to allow for the only true arid the only correct conclusion, rather than an interpretation that is merely " accepted as adequate " as the Commissioner's conclusion now stands.

Since there is no DEFINATE EVIDENCE supporting the Commissioner's erroneous conclusion, in the record, there must be given credence to the substantive evidence that supports a different conclusion, and to allow for further discovery from the source of the available records that will produce the DEFINATE EVIDENCE.

That the Court has a supreme responsibility to be fair, to allow for the discovery and production of the available pertinent records that will provide the DEFINATE EVIDENCE, that will inturn provide for a true and just conclusion.

To promote the efficient administration of justice, this Court, would be empowered to conduct a de nova review, where the purpose of such review would result in the production of the DEFINATE EVIDENCE, that would provide proof beyond a reasonable doubt, and beyond the mere substantial evidence, thereby allowing for a true and correct conclusion of the dispute between the Plaintiff and the Defendant, the Commissioner, regarding who's contraily stated conclusion is actually, positively, and absolutly correct.

DISSC'JSSION OF THE EVIDENCE

Exhibits # 21 and # 22 (Tr. 19), (Tr. 193-98) to which the " ALJ " refers to in his in interpretation of the so-called substantial evidence to erroneously conclude that PETER'S applications for Social Security Insurance benefits, made for him in November 1976, was filed incorrectly on his account only, but not correctly on Mamie's account, whom was fully insured. That PETER did not prove dependency on Mamie, eventhough his earnings were not reported to the Social Security Administration. And that, Mamie's application for

Social Security Disabillty Insurance, made in October 1976, was filed incorrectly, not seeking benefits for her spouse. And that, when the lump-sum death benefit was granted for PETER on Mamie's account in March 1979, that Widower's Insurance benefits were not granted , as set forth in the "ALJ" decision, dated August 18, 1984 (Tr. 19),(Tr. 21-22), are merely typed and written reports that were generated by a SSA employee at the Northtown Plz. branch office, that are entirely subject to incompleteness, human error or malfeasance, and can not serve as the DEFINITE EVIDENCE, as set forth in the Affidavit of SSA representative Miss. Keller, at the Cheektowaga, branch office, dated August 6, 1996, attached hereto.

Indeed the Social Security number used for Mamie Iannaccone, 126 05 2576, is incorrectly entered in Exhibit # 22 as 126 05 2579 (Tr. 194-97).In support of the fact that such kind of reports generated at the SSA Northtown Plz. office do contain additional errors is demonstrated by Mr. Paul Bogumil Sr., SSA claims representative, at the Northtown Plz. branch office, during his testimony given, under oath, at the hearing before the ALJ on July 15, 1993, where in referring to the stated information contained in the report of contact, dated 4/17/92 (TR 159.), he states " And that, incidently, is wrong, that-- if the lump sum was paid in 2/79, then the notice would have been sent in 2/79. The notice and the check would have been sent in 2/79 (Tr.98 -99), repeat On (Ti'. 341).

Furthermore, in support of the fact that Exhibits #21 and # 22 (Tr.. 193-98) are entirely subject to incompleteness, human error or malfeasance, and can not serve as the DEFINATE EVIDENCE, Plaintiff made additional consultations with other SSA representatives, included, and, as set forth, in the Affidavit of Willlam G. Iannaccone, dated August 12, 1996, attached hereto.

Since the true facts of what actually took place as a result of PETER'S applications for Social Security Insurance benefits made for him prior to January 25, 1984, including the actual application for the lump-sum benefit, made on Mamie's account, around February 1979 (Tr. 98-99),(Tr. 199), Repeated on (Tr. 341), where such true facts of the specific evidence would have been contained in the actual paper " file " which was reportedly " destroyed " by the Social Security Administration, in September of 1984 (Tr. 159), repeated on (Tr. 234), the only logical, and legally correct way to definatly prove if PETER'S applications were filed correctly, on both PETER'S and Mamie's accounts, that would have resulted in

actual payments under " the Act "' being made for PETER, would be ascertained from all those available records pertaining to whether, or not, Social Security Insurance benefit payments (monthly checks) were ever actually made for PETER, prior to June 1983, including address sent, where such records would serve as the DEFINATE EVIDENCE, Including all those records that can he provided by the SSA payment center, located at One Jamaica Center Plz., 155-10 Jamaica Avenue, Jamaica, New York, ll432-3830

CONCLUSION

Since the Commissioner's determination is not supported by the DEFINATE EVIDENCE, it is therefore not entitled to affirmance.

Plaintiff's determination is reasonable and acceptable, for supporting his conclutions.

That, Defendant, the Coinin½sioner's Motion for Judgment on the Pleadings, dated March 5, 1996, pursuant to Rule 12 (c) of the Fed.R.CIv.P., should be denied.

That Plaintiff's Motion for Acceptance of Delayed Service of Process Upon Defendant (2) Marie Law, and that, the Action Against Defendant (2) Marie Law Not be Dismissed, dated and filed on February 20, 1996, should he granted.

That, Plaintiff's Motion for Nonafflrmance of Commissioner's determination in response to Commissioner's Motion for Judgment on the Pleadings. And, to allow Plaintiff's proposed filing of Motion for Discovery and/or Production of Documents under Fed.R.Civ.P. 26-37, dated August 9, 1996, should he granted.

That, the Court order, dated June 4, 1996, requesting that Plaintiff's Motion for enlargement, of time, up to and including August 29, 1996, to file Plaintiff's response to Commissioner's motion for judgment on the pleadings, filed on May 16, 1996, be stayed, as is the related underlying schedule for further actions, pending a determination by this Court of the Plaintiff's right to represent the Estate of PETER IANNACCONE, In Federal Court, as pro se, in this action, should be lifted.

That, a determination should be made, to allow Plaintiff to continue his actions for the Estate of PETER IANNACCONE, to benefit such estate, in the best way possible, under the circumstances, as pro se, as determined by the Plaintiff as Claimant and Administrator for the estate.

That, Plaintiff's Motion for enlargement, of time, up to

and including August 29, 1996, filed on May 16, 1996, should be granted.

And, for such further relief as this Court may deem just and proper.

Dated : Cheektowaga, New York, August 9, 1996.

Respectfully submitted,
By: S/s William G. Iannaccone
WILLIAM G. IANNACCONE
Attorney pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ESTATE OF PETER IANNACCONE, Deceased,
by WILLIAM G. IANNACCONE, ADMINISTRATOR and
CLAIMANT, pro se,

Plaintiff,

V.

(1) SHIRLEY S. CHATER, COMMISSIONER
of SOCIAL SECURITY, and
(2) MARIE LAW, Former Custodian of
SSA Funds Payable for PETER
IANNACCONE,

Defendants 95-CV—555 (S)

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE)
CITY OF BUFFALO)

William G.Iannaccone, being duly sworn, deposes and says:

1. I am the Administrator for the Estate of PETER IANNACCONE, the Claimant and attorney pro se in the above captioned matter, and as such, I am fully familiar with all pleadings' and proceedings herein.

2. Plaintiff, commenced this action by filing Complaint on July 11, 1995, and paid the filing fee, for a review of the Administrative Law Judges decision, dated August 18, 1994, provided for in section 205 (g) of the Social Security Act, as amended (42 U.S.C. 405 (g)).

3. I submit this Affidavit in support of Plaintiff's motion for non-affirmance of Commissioner's determination in response to Commissioner's motion for judgment on the pleadings. And, to allow Plaintiff's proposed filing of motion for discovery and/or production of the documents under Fed.R.Civ.P. 26-37.

4. That, within the recent few weeks, I had a personal consultation with SSA claims representative, Mr. Dixon, at the SSA Cheektowaga branch office, located at 2875 Union Road, Cheektowaga, New York, whom informed me, after his review of Exhibits # 21 and # 22 (Tr. 193-98) that; These reports are from the SSA Northtown Plz. branch office. Anybody could have made an error in entering information on such reports. I doubt that the file on PETER and Mamie Iannaccone were actually destroyed. And whom provided, to me, the address of the SSA Payment Center, located in Jamaica, New York, and stated that; the SSA Payment Center records would have the proof as to if SSA Insurance benefits were ever paid for PETER, prior to July 1983. Mr. Dixon also stated that; the SSA computer system shows no income reported for PETER in 1976.

5. That on August 2, 1996, I had a personal consultation with SSA representative Miss. D. Winter, at the SSA, City of Buffalo branch office, located at 111 West Huron Street, Buffalo, New York, whom affirmed as being true all those statements, as found on the Affidavit of SSA Rep. Miss. Keller, dated August 6, 1996, herein attached, and numbered paragraphs four thru eleven.

6. That during my consultation with SSA Rep Miss Keller, on August 6, 1996, at the SSA Cheektowaga, New York, branch office, located at 2875 Union Road, Cheektowaga, New York, I was provided the attached SSA computer read-out, dated August 6, 1996, by Miss. Keller, showing no earnings reported for PETER IANNACCONE, for years requested, hereto attached as Exhibit " A ".

7.That, in response to the Defendant, the Commissioner's attack on my credibility of my given testimony, made by me, before the " ALJ ", on July 15, 1993, in her memorandum of law in support of the Commissioner's motion for judgment on the pleadings, page 10, last paragraph, and page 11, first paragraph, that questions my truthfulness in asserting that during my personal visit in 1983 arid 1984, to the SSA Northtown Plz. branch office, that I was misinformed by a SSA claims representative, that my father, was not entitled to Medicare, even-though he was over age 65, due to him being a %l00 disabled veteran, entitled to Veteran's Administration medical care only. And that, my request to file an application, for my father, at that time, was denied, by such SSA claims representative, whom stated, to me; There is no need to file an application, for PETER, since no benefits are due him (Tr.123-24),(Tr. 294-95), repeated on (TR. 351-52), I reaffirm that such testimony given, Is absolutely true, that I have a distinct vivid

recollection of such SSA claims representative making such statements of misinformation, and also recall the visual characteristics, of such SSA claims representative, as well.

It is not my integrity that should be questioned, since it has already been established by the " ALJ in his decision of August 18, 1994, that SSA personnel at the Northtown Plz. branch office, failed to ascertain from the available information provided by the Plaintiff, in 1983 and 1984, that PETER was eligible to apply for benefits on Mamie's account, and failed to inform PETER or those acting on his behalf (TR 24-25)

Such a failure by SSA personnel, did cause injury, to my father, by denying him his guaranteed rights, as written into "the Act " to Survivors Insurance and Medicare coverage, at age 65.

Due to PETER'S expressed severe adversity to the Veteran's Administration medical facilities (TR. 67-69) Medicare coverage was crucial in this specific case in providing PETER'S insurance for medical care, at age 65, as guaranteed under " the Act. "

To question my integrity, in such a sensitive issue, to the Iannaccone family, that caused my father to go without Medicare insurance, is adding insult to the injury, and is absolutely uncalled for and should have been more carefully thought out.

What is even more devastating to the Iannaccone family is that such failure by SSA personnel to inform my father or those acting on his behalf, in 1983 and 1984, of my fathers eligibility to Medicare and Widower's Insurance, strongly appears to have been deliberate, due to bias towards Marie Law, as former SSA " Custodian " for funds payable for PETER, made under "the Act" prior to July 1983.

Page citations are to the transcript of the administrative record filed by the Commissioner as part of her answer.

8. Also, I take this opportunity, to reaffirm, that my given testimony, given before the "ALJ " on July 15, 1993, stating that: I was living with my father from 1975 thru 1992. And that, I was responsible for my father's care, at that time, is absolutely true (Tr. 113-14), repeated on (Tr. 347-48). I also would add that I was much more sensitive to my father's personal needs, then Marie Law, whose relationship, to my father, was remote.

9. That, I did file into the Erie County Surrogate's Court file for PETER IANNACCONE , file # 92-5085, the first name perfected correction, to PETER, with no middle initial, formally known as PETER W., as made on PETER'S original-certified, copy of the death certificate for PETER IANNACCCNE, filed on July 31, 1996, And that the Letters of Administration was Amended to the Estate of PETER IANNACCONE.

S/S WILLIAM G. IANNACCONE

Subscribed and sworn to

before me this 12th day of

August, 1996.

S/S Kathleen L. Fleischer
NOTARY PUBLIC
My Commission Expires 12-13-97

CERTIFICATE OF SERVICE BY MAIL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ESTATE OF PETER IANNACCONE, Deceased,
by WILLIAM G. IANNACCONE, ADMINISTRATOR and
CLAIMANT, pro se,
Plaintiff,
V.
(1) SHIRLEY S. CHATER, COMMISSIONER
of SOCIAL SECURITY, and
(2) MARIE LAW, Former Custodian of
SSA Funds Payable for PETER IANNACCONE,
Defendants. 95-CV-0555 (S)

The undersigned hereby certifies that I am the Administrator for the Estate of PETER IANNACCONE, the claimant and attorney pro se in the above captioned matter, and as such, I am fully familiar with all pleadings and proceedings had herein, and a person of such age and discretion as to be competent to serve papers.

That on August 12, 1996, I served a copy of the attached Notice of Motion for Non-affirmance of Commissioner's Determination in response to Commissioner's Motion for Judgment on the Pleadings. And, to allow Plaintiff's proposed filing of Motion for Discovery and/or Production of Documents under Fed.R.Civ. P. 26-37, with supporting Affidavits by SSA Rep. Miss Keller and William G. Iannaccone, and with supporting Memorandum of Law, by placing a copy in a post paid envelope addressed to the persons hereinafter named, at the addresses stated below, which is the last known address and by depositing said envelopes and contents in the United States mail at 285 Cayuga Road, Cheektowaga, New fork, 14241.

ADDRESSEES: Mary E. Fleming
Assistant U.S. Attorney
Attorney for the SSA Commissioner
138 Delaware Avenue
Buffalo, New York, 14202

S/S WILLIAM G. IANNACCONE

John R. Streb
Attorney for Marie Law
2953 Elmwood Avenue
Kenmore, NY 14217-1229

SEQY DTE:08/06/96 AN:712-14-2693 DOC:898 UNIT SUE
PG001

MEF: QN: 712 14 2693 NA: P W IANNAC DB: 03/11 SX M AK
SUMMARY FICA EARNINGS FOR YEARS REQUESTED
124.59 EARNED 37-50/YEARLY EARNINGS
AMOUNTS NOT AVAILABLE

YR	EARNINGS	YR	EARNINGS	YR	EARNINGS	YR	EARNINGS
53	808.42	58	.00	63	.00	68	.00
54	.00	59	.00	64	.00	69	.00
55	.00	60	.00	65	.00	70	.00
56	.00	61	.00	66	.00	71	.00
57	.00	62	.00	67	.00	72	81.41

SUMMARY MQGE EARNINGS FOR YEARS REQUESTED
NO MQGE EARNINGS FOR YEARS REQUESTED
REMARKS
CLAIMS ACTIVITY SEE MBR
RAILROAD INVOLVED/LESS THAN 120 SERVICE
MONTHSL
W-2 PENSION EARNINGS PRESENT FOR: 1985-1990

SEQY DTE: 08/06/96 AN:126-05-2576 DOC:B98 UNIT:SUE
PG: 001
MEF QN 126-05-2576 NA: M IANNAC DB: 03/18 SX;F AK
IAMACC
SUMMARY FICA EARNINGS FOR YEARS REQUESTED
11042.14 EARNED 37-50/YEARLY EARNINGS AMOUNTS
NOT AVAILABLE

YR	EARNINGS	YR	EARNINGS	YR	EARNINGS	YR	EARNINGS
51	2982.65	58	4200.00	65	4800.00	71	7800.00
52	1502.06	59	4800.00	66	6078.46	72	6806.63
53	1842.95	60	4800.00	67	4043.65	73	8782.41
54	3600.00	61	4736.26	68	7219.90	74	9798.57
55	4200.00	62	3810.46	69	7353.29	75	10323.50
56	4200.00	63	4800.00	70	7040.48	76	4536.98
57	4200.00	64	4800.00				

SUMMARY MQGE EARNINGS FOR YEARS REQUESTED
NO MQGE EARNINGS FOR YEARS REQUESTED
REMARKS
CLAIMS ACTIVITY—SEE MBR

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

ESTATE OF PETER IANNACCONE, Deceased,
by WILLIAM G. IANNACCONE,
ADMINISTRATOR, C0-COMMITTEE and
CLAIMANT FOR DECEDENTS ESTATE

Plaintiff

V.

(1) SHIRLEY S. CHATER, COMMISSIONER
of SOCIAL SECURITY, and
(2) MARIE LAW, FORMER CUSTODIAN OF
SSA FUNDS PAYABLE FOR PETER IANNACCONE

Defendants.

95 -CV-0555 (S)

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE)
CITY OF BUFFALO)

WILLIAM G. IANNACCONE, being duly sworn, deposes and says:

1. Your Deponent, is the Erie County Surrogate Court appointed Administrator, and the New York State Supreme Court appointed Co-committee, along with Eleanor Iannaccone, whereon, such capacities are still valid and in full force, for the Person and Estate of PETER IANNCCONE, the Claimant, in the above captioned matter, and, as such, I am fully familiar with all pleadings and proceedings herein. Attached hereto as Exhibit "A" is the original Certificate of Administration, certified on January 6, 1997. Also attached hereto as Exhibit "B' is the original Certificate of Co-committee-ship, certified on January 6, 1997.

2. Plaintiff, the Estate of PETER IANNACCONE, commenced this action by filing Complaint on July 11, 1995, and paid the filing fee, for a review of the Administrative Law Judge's decision, dated August 18, 1994, provided for in section 205 (g) of the Social Security Act, as amended (42 U.S.C. 405 (g)

3. That, on June 4, 1996, this Court stayed Plaintiff's motion for enlargement of time, having been requested for up to and including August 29, 1996, in which Plaintiff may file its response, to the Defendant Commissioner of Social Security's motion for judgment on the pleadings, pending a determination, by this Court, of the Plaintiff-administrator's right to proceed pro se, in a fiduciary or representational capacity, in the above captioned matter.

4. That, on August 12, 1996, Plaintiff filed, with this Court, its Motion for Non-affirmance of Commissioner's Determination, in response to, Commissioner's Motion for Judgment on the Pleadings. And, to Allow, Plaintiff's Proposed Filing of Motion for Discovery and/or Production of the Documents, Under Fed.R.Clv.P. 26-37, With Supporting Memorandum of Law, and with Suporting Affidavits by Social Security Administration Representative, Miss. Keller, and by, William G. Iannaccone.

5. That, on August 26, 1996, Plaintiff filed with this Court, Its Motion for Acceptance of Plaintiff's Corrections Made, to the Administrative Record, as filed, by the Commissioner, as part of her answer, as valid, with supporting affidavit by William G. Iannaccone.

6. That, on November 14, 1996, this Court, issued Order, that, Plaintiff-administrator shall obtain counsel to represent the Estate, in the above captioned matter, on or before January 15, 1997. And further ordered, that, should Plaintiff-administrator fail to obtain counsel, by this date, Plaintiff's Complaint will be dismissed without prejudice, and the Clerk of the Court shall, at that time, take whatever other actions are necessary to close this case; however, Plaintiff may subject to the statute of limitations, file this action again whenever an attorney is prepared to present the Estate's case. Attached hereto, as Exhibit "C" is a copy of' Order of this Court, issued November 14, 1996.

7. That, in retrospect, 'Your Deponent, did telephonically contact the Erie County Bar Association/ Lawyer Referral Service, on June 6, 1995, to obtain an attorney referral, for the commencement of this action, in the above captioned matter.

Your Deponent, at that time, of June 6, 1995, did explain, in full, the important specifics of this matter, including that, this claim includes alleged criminality due to conversion of, and failure to account for, the federal Social Security funds belonging to PETER IANNACCONE, paid out by the Social Security Administration, for the time period, including from November 1976 thru June 1983, and now owed to his Estate, by the former custodian of such Social Security funds, Marie

Law (Tr.280), whom allegedly failed to account for such SSA payments even when required under oath, to do so (Tr. 278-293). And where, such alleged criminality is entered into the record,on(Tr.~70(Tr.73~75),(Tr.79~80),(Tr.97~98),(Tr.l00),(Tr.114),(Tr.l2O),(Tr.148) (Tr. L5O-l5l),(Tr.l55),(Tr.160-162),(Tr.165—166),(Tr.180..181),(Tr.216),(TR,235to236),(TR237),(Tr.249),(Tr.2'78to2'79),(Tr.238-286),(Tr.302...308). Repeated on; (Tr. 331—334),(Tr.340-341),(Tr.348),(Tr,350),(Tr.35l).and on;(Tr.364). Your Deponent, also explained that Plaintiff must file civil action by July 12, l997, by filing Complaint.

Your Deponent, was informed, by a person, whom identified herself, as Amy, and whom, represented' the E.C.B.A./Lawyer Referral Service, on that same day, and time of June 6, 1995, that, this matter may well be within the jurisdiction of the Erie County District Attorney's Office and/or the United States Attorney's Office, on the basis of fraud.

That, on June 12, 1995, Your Deponent, was telephonically contacted, by this same individual, whom identified herself, as Amy, and whom represented the E.C.B.A./Lawyer Referral Service, to inform, Your Deponent, that, after her offices research, into this matter, she could not provide, to me, any name, of any attorney, for referral.

Your Deponent, then explained, to Amy, at that same time and day of June 12, 1995, that, since I needed to file a civil action, with Complaint, by July 12,

(Page citation is to transcript of administrative record filed by Commissioner)

1995, would she please provide, to me, a written verification, that, although I had contacted her office, on June 6, 1995, and, that, after her offices research, into this matter, this office, could not provide me with an attorney referral. Amy, did agree to, this request, and did take my name and mailing address, at that time.

That, on June 13, 1995, however, Amy again telephonically contacted, Your Deponent, to inform me, that, her office could not grant my request, for a written verification, of me, contacting her office, on June 6, 1995, for a attorney referral, and her offices research results, being a non -referral.

8. That, by letter, dated June 19, 1995, Your Deponent, did write to the Supervisor of the E.C.B.A./Lawyer Referral Service, to confirm specifically what had transpired between myself and that office, since my initial contact on June 6, 1995 thru the last contact made, on June 13, 1995. Your Deponent, received, no reply, written or telephonic, from the

E.C.B.A./Lawyer Referral Service, regarding my June 19, 1995 letter, as such. Attached hereto as Exhibit "D" is a copy of my June 19, 1995 letter as hereinabove described. Also, attached. hereto, as part of Exhibit "D" is a copy of U.S. Post form 3811, showing that such hereinabove described letter, dated June 19, 1995, was received by the office of the E.C.B.A./Lawyer Referral Service, on June 22,1995.

9. That, in retrospect, Your Deponent, in addition to contacting the E.C.B.A./Lawyer Referral Service, as hereinabove described, did. telephonically contact, did personally consult with, and did write to, several attorneys for retainment of counsel, for the commencement, of this action, in the above captioned matter, previous to, and including, the month of June 1995. And that, no attorney, I contacted, was willing to accept representation, of this case, having provided to Your Deponent, a variety of non-substantial reasons for non-representation.

10. That, in retrospect, included among the many contacts made, to several attorneys, by Your Deponent, for retainment of counsel, for the commencement, of this action, in the above captioned matter, previous to, and, including, the month of June 1995, was the documented contact, by personal consultation, with attorney Salvatore T. Sanfilippo, on June 1, 1995, whom, by letter, dated June 1, 1995, received by Your Deponent, refused my case due to lack of expertise. Attached hereto, as Exhibit "E" is a copy of such letter, herein above described, dated June 1, 1995, by Salvatore T. Sanfilippo.

11. That, in retrospect, also included, among the many contacts made, to several attorneys, by Your Deponent, for retainment of counsel, for the commencement of this action, in the above captioned matter, by filing Complaint, previous to, and including, the month of June 1995, was the documented telephonic contact made, by Your Deponent, to attorney Kenneth P. Bernas, on June 6, 1995, whom, requested from me, at that same time, a $1,000.00 (ONE-THOUSAND DOLLAR) retainer fee, and signature of retainer agreement, whereupon, Your Deponent, did agree to such requests, for retainer fee, and signature of retainer agreement, and did provide to attorney Kenneth P. Bernas, an estate check # 298 payable to him, in the amount of $ 1,000.00 (ONE-THOUSAND DOLLARS), for retainment of counsel, in this above captioned action, enclosed is my written correspondence, to Kenneth P. Bernas, dated June 14, 1995 Your Deponent, however, by letter dated June 16, 1995, did receive notification, from attorney Kenneth P. Bernas, of non-representation, for Commencement, of the above captioned matter, due to the current overload of office work. Attached

hereto as Exhibit "F" is a copy of my letter, dated June 14, 1995, to attorney Keneth P. Bernas, as hereinabove described. Also attached hereto, as part of Exhibit "F" is a copy of estate check # 298, the amount requested by Kenneth P. Bernas, for retainer fee, as described herein above. And also attached hereto, as part of Exhibit "F" is a copy of the letter received, by Your Deponent, from attorney Kenneth P. Bernas, dated June 16, 1995, as hereinabove described.

12. That by letter dated December 5, 1996, in compliance, to the Order, issued by this Court, on November 14, 1996, Your Deponent, did by such written instrument, addressed to the Supervisor of the E.C.B.A./Lawyer Referral Service, request for a second time, that, a search be made, for lawyer referral, in seeking obtainment of counsel, by Plaintiff-administrator, in this action, in the above captioned matter. And that, enclosed along with such written correspondence, dated December 5, 1996, as hereinabove described, was a copy of the previous first written request for lawyer referral, addressed to, and received by, the office of the Supervisor of the E.C.B.A./Lawyer Referral Service, dated .June 19, 1995, attached hereto, as Exhibit "D". Also, enclosed along with such letter, hereinabove described, dated December 5, 1996, was a copy, of the Order, issued by this Court, on November 14, 1996, attached hereto as Exhibit "C"; a copy of Plaintiff's Complaint, filed with this Court on July 11, 1995; a Social Security Case Chronological Summary, dated September 23, 1996; and, Index of Current Motions Filed, in this action, so that, the record of this case could be understood readily, in a simplified, yet explicit format. Attached hereto as Exhibit "G", is a copy of the hereinabove described letter, to the Supervisor of the E.C.B.A./Lawyer Referral Service, dated December 5, 1996, with complete enclosures also hereinabove described. And also, attached hereto as part of Exhibit "G", is a copy of U.S. Post form 3811, showing that such letter, described hereinabove, dated December 5, 1996, with complete enclosures, was received, by the office of the Supervisor, of the E.C.B.A./Lawyer Referral Services on December 6, 1996. That,on December 6, 1996, before noon, Your Deponent, was telephonically contacted, by a Ms. Carolyn M. Hamele, Coordinator of the E.C.B.A./Lawyer Referral Service, whom stated, to Your Deponent, at that time, that, she had received my letter dated December 5, 1996, with complete enclosures, and that, due to my first request for a lawyer referral, made June 6, 1995, for retainment of counsel, in this action, and due, to her offices inability to locate any attorney, for referral, in this matter, at that time, of June 6, 1995, she would be unwilling, to make a second search for a lawyer referral, being requested by my letter dated December 5, 1996. Ms. Carolyn

M. Hamele, also, clearly stated, to Your Deponent, at that time, of December 6, 1996, that she did not have to provide me anything, in writing, as to my first request made, June 6, 1995, pertaining to the results of her offices search for a lawyer referral, being a non-referral. Ms. Hamele, also clearly stated, that, she would also not provide, to Your Deponent, anything in writing, regarding this second request for lawyer referral, made by Your Deponent's letter dated December 5, 1996, as hereinabove described. Ms. Hamele then abruptly ended our conversation.

That, on that same day, of December 6, 1996, Ms. Carolyn M. Hamele, did again contact me, telephonically, for a second time, to relent, to Your Deponent, that, she would indeed make a second search for a lawyer referral, in this case, in the above captioned matter, pursuant to my letter for such request, dated December 5, 1996, and that, she would indeed provide, to Your Deponent, in writing, the results of such second search for attorney referral.

That, by letter, dated December 13, 1996, from Ms. Carolyn M. Hamele, Coordinator of the E.C.B.A./Lawyer Referral Service, Your Deponent, received notice, erroneously making reference to this case, involving, Social Security Disability Benefits, and that, no lawyer could be located, by her office, for a referral.

That by letter dated December 16, 1996, Your Deponent, did assert to Ms. Hamele, that, nowhere, in any of my written. correspondence, to her office, or at any other time, did I ever indicate, that, this case involved Social Security Disability. And that, I be informed of any change in her determination, in light of such correction, as made by her written determination made December 13, 1996. Your Deponent, has received no response, written or telephonic, or by any other means, from my letter dated December 16, 1996, as described hereinabove. Attached hereto as Exhibit "H" Is a copy of Ms. Hamele's letter, to Your Deponent, dated December 13, 1996. Also, attached hereto as part of Exhibit "H" is Deponents letter dated December 16, 1996, to Ms. Hamele, with copy of U.S. Post form 3811, showing that such letter, dated December 16, 1996, by Your Deponent, was received by the office of Ms. Hamele, E.C.B.A./Lawyer' Referral Service, on December 17, 1996.

13. That, in addition to contacting the E.C.B.A./Lawyer Referral Service, by letter dated December 5, 1996 and December 16, 1996, as hereinbefore described, Your Deponent, did, in compliance to the Order of this Court, issued November 14, 1996, for obtainment of counsel, in the above captioned matter, contact several attorneys, including

those listed in the Lawyers Guide under Social Security Law, by written correspondence mailed and dated December 10, 1996, using a signed and addressed form letter, that was sent via certified mail, addressed to each attorney, with explanative enclosures, being; (1) Order issued by this Court on November 14, 1996; (2) Social Security Case chronological Summary; (3) Plaintiff's Complaint filed on July 11, 1995; (4) Index of Current Motions filed and (5) Affidavit by Social Security Representative Miss. Keller, dated August 6, 1996, and entered into the record on August 12, 1996, so that, the record of this case, could be readily understood, in a simplified, yet, explicit format. Attached hereto as Exhibit "I" is a copy of such form letter, that was signed and addressed to each attorney, with complete enclosures, also hereto attached, as hereinabove described, that was sent to each attorney on December 10, 1996.

14. That, the names and. addresses of those attorneys, that, were in receipt of, Your Deponents, signed form letter, dated December 10, 1996, mailed via certified post, on December 10, 1996, with complete enclosures, attached hereto as Exhibit "I" are; (1) Vanessa L. Bliss, 605 N. Division, Buff.,N.Y., 14210; (2) Giles P. Manias, 160 North St.,Buff.,N.Y.,l4202; (3) Diane S. Hinman, 1400 Statler Towers, Buff.,N.Y.,14202; (4) Melvin L.Hurwitz, 1725 Liberty Building, Buff.,N.Y., 14202: (5) William C. Bernhardi, 950 A Union, Suite 40, W. Seneca,N.Y.,14224; (6) Bonnie A. McLaughlin, 305 Elmwcod Ave.,Buff., NY., 14222 and (7) Felice A. Brodsky, 556 S. Transit, Lockport, N.Y.,l4094. Attached hereto as Exhibit "J" is a copy of U.S. Post forms 3811, for each of the seven attorneys listed hereinabove.

15. That, in response, to Your Deponents, certified mailings, made on and dated December 10, 1996, to the seven attorneys, hereto attached as Exhibits "I" and "J", are letters by; Giles P. Manias, dated December 13, 1996, whom, refused to review my correspondence, regarding my request for counsel; Bonnie A. McLaughlin, dated December 19, 1996, whom, simply expressed her wish not to represent, Your Deponent, in the above captioned matter; and, William C.Bernhardi, dated December 14, 1996, who also declined representation in the above captioned matter. Attached hereto as Exhibit "K" are such letters of non-representation dated December 13, 1996, by Giles P. Manias; dated December 19, 1996, by Bonnie A. McLaughlin; and dated December 14, 1996,by Wi1liam C. Bernhardi, as

hereinabove described.

16. That, also, in response to, Your Deponents, certified mailings to the seven attorneys, made on December 10, 1996, hereto attached as Exhibit "I" and "J" are letters by attorney, Kathleen A. Molloy, whom, represents the law firm of Hurwitz & DiMatteo, dated December 16, 1996, whom, erroneously indicated, in her letter of December 16, 1996, that this case involved Social Security Disability, and whom, denied to take action, in the above captioned matter.

That, Your Deponent, by letter dated December 17, 1996, annexed to the returned Deponent's letter of December 10, 1996, with complete enclosures, hereto attached as Exhibit "I", did correctly inform attorney Melven Hurwitz, that, nowhere in my correspondence, to him, did I ever indicate, that, this case involved Social Security Disability. Your Deponent, requested that Mr. Melvin Hurwitz reevaluate the documentation provided and returned via Deponents letter of December 17, 1996, as hereinabove described, and that, a corrected response, be provided, to Your Deponent.
That, by letter dated December 19, 1996, Your Deponent, did receive acknowledgement of my December 17, 1996 correspondence, from Ms. Kathleen A Molly, whom represents the law firm of Hurwitz & DiMatteo, and whom, again advised, that, her office will be unable to assist me, in the above captioned matter. Attached hereto as Exhibit "L" are copies of letters by Ms. Kathleen A. Molly, dated December 16, 1996; Deponent's letter to Mr. Melvin Hurwitz, dated December 17, 1996, with U.S. Post form 3811, showing receipt date as December 18, 1996; and Ms. Kathleen A. Molly's letter, dated December 19, 1996,as hereinabove described.

17. That, also, in response, to Your Deponent's, certified mailings, made on, and dated December 10, 1996, with complete enclosures, to the seven attorneys, hereto attached as Exhibits "I" and "J" is the most recent letter, as to this writing, received by, Your Deponent, on January 9, 1997, from attorney Felice A. Brodsky, such letter dated January 9, 1997, stating that " I have carefully reviewed the materials that you sent to me. I feel that I cannot undertake this case as requested because I was employed with the Social Security Administration during the time in question and believe it would be a conflict of interest." Attached hereto as Exhibit "M" is a copy of letter by Felice A. Brodsky, dated January 8, 1997, as hereinabove described.

18. That, Your Deponent, is still, at the time, of this writing, anticipating a response from my signed and addressed December 10, 1996 correspondence, with complete

enclosures, hereto attached as Exhibit "I" and "J", requesting counsel, in the above captioned matter, in compliance to the Order issued by this Court on November 14, 1996, since no response has yet been made, from the following two attorneys: Vanessa L. Bliss, 605 N. Division, Buff.,N.Y., 14210 and Diane S. Hinman, 1400 Statler Tower, Buff., N.Y., 14202.

19. That, Your Deponent, asserts that the failure of the Social Security Administration to correctly inform PETER IANNACCONE, or Your Deponent, on his behalf, of PETER'S eligibility to Medicare A and B, and Social Security Benefits, in 1983 and January 1984 (Tr. 25), did cause severe personal injury to PETER IANNACCONE (Tr. l2l-124),(Tr. 152),(Tr. 18l),(Tr. 187),(Tr. 216),(Tr. 237),(Tr. 249),(TR. 255),(Tr. 264),(Tr. 266),(Tr. 305—308),(Tr. 377-378), (TR. 350-351).

20. That, Your Deponent, asserts that the dismisa1 of Plaintiff's Complaint and closure of this case, in the above captioned matter, should be avoided ,by this Court, by any means possible, since such action would be further injurious to the Estate of PETER IANNACCONE. would be detrimental to the maintenence of the decedent's real estate at 119 Ellen Drive, Cheektowaga, Now York, 14225, presently being cared for and financed, by Your Deponent. And, would be injurious to the beneficiaries of his estate, and contingent beneficiaries of his estate, including, Your Deponents son, William Sol Iannaccone, whose date of birth is July 29, 1971.

2l. That, the Estate of PETER IANNACCONE, does have medical debts owed, to creditors, in the amount of $ 3,982.96 (Threethousand-Ninehundredeightytwo dollars & 96 cents, since 1992, which is payable under Medicaie B Insurance, and which, was brought to the attention of the Social Secuity Administration and Administrative Law Judge (TR. 173-184), (Tr. 2l6-23l), (TR.238) and (TR. 247-277), and where, the SSA Northeastern Program Center's, Assitant Regional Commissionr, Ann. Jacobosky, had notified William G. Iannaccone, by letter dated September 27, 1994 (Tr.312-313), that, by mistake PETER'S medical insurance, enrollment was not processed on time, requesting $ 3,659.10 (Three-thousand-sixhundrod-fiftynine dollars & ten cents), for premiums for this insurance, and, stating that " If you feel any action we are taking to carry out the decision is wrong, you also have the right to appeal that part at your case (TR 313)." And where, such appeal for premium waiver or reduction was made, by William G. Iannaccone., by his appeal letter dated November 21, 1994, to the SSA Appeals Council, *5107* Leesburg Pike, Falls Church, Virginia, 22041-3255 (TR. 376-

378). And where, the SSA Appeals Council did respond, by letter to William G. Iannaccone, dated March 9, 1995, by Larry K. Banks, Aministrative Appeals Judge (TR 13), stating that, "In your letter of November 21, 1994, you asked the Council to waive Medicare premiums in the amount of $ 3,659,10 which the Administration did not withhold from the retroactive check of $ 66,795.OO, and has now asked you to pay. The Northeastern Program Center will respond to your request when your claim file is returned to that office, (Tr. 13)."

That, the dismissal of the Plaintiff-administrator's Complaint and, closure of this case, in the above captioned matter, would further delay resolution of this issue of Medicare B Insurance coverage, and requested Premium waiver, as made, which would cause financial injury to the Estate of PETER IANNACCONE, and further prolong the burden of the Estate's creditors.

22. That, Your Deponent, asserts that, this Court should avoid further severe injury and injustice to the Estate of PETER IANNACCONE, to the beneficiaries and contingent beneficiaries of his estate, and placing further burden on the creditors of his estate, by dismissal of Plaintiff's Complaint and closure of this case. And that, this Court should allow for a review of the Administrative Law Judge's decision, dated August 18, 1994, as provided for in section 205 (g) of the Social Security Act, as amended (42 U.S.C. 405 (g)).

23. That, Your Deponent, asserts that, this Court should allow for the release of all complete available Social Security Administration records pertaining to PETER IANNACCONE, including those records of actions taken, and by whom, that preceded and led to the Social Security Administration's claim that the application file for PETER and Mamie Iannaccone was destroyed in September of 1984 (Tr. 159) and (Tr. 234), so that, a through investigation of the federal Social Security funds available to PETER IANNACCONE, from November 1976 thru June 1983, can be made, and thus allowing for through investigation of alleged criminality, due to the conversion of, and failure to account for the federal Social Security funds belonging to PETER IANNACCONE, paid out by the Social Security Administration, for the time period, including from November 1976 thru June 1983, and now owed to his Estate, by the former custodian of such Social Security Funds payable for PETER IANNACCONE, the named Defendant in this action, Marie Law, (Tr. 280), whom allegedly failed to account for such SSA payments, belonging to PETER IANNACCONE, even when required under oath, to do so (Tr. 278-293). And where, such alleged criminality has been entered into the record, of

the above captioned matter, on (Tr. 70),(Tr. 73-75), (Tr. 79—80),(Tr. 97-98),(Tr.100),(Tr. 114),(Tr.120),(Tr.148),(Tr.150 151),(Tr.155),(Tr.160-162),(Tr.165—166),(Tr.180—181),(Tr. 216),(TR.235-.236),(Tr.237),(Tr.249),(Tr.278-279),(Tr.238-286),(Tr.302-308),Repeated on; (Tr.331-334),(Tr.340-341),(Tr.348),(Tr.350),(Tr.351). And on; (Tr.364).

24. That, Your Deponent, on December 4, 1996, did personally visit with Federal Bureau of Investigation agent Peter Trinkwalder, at the F.B.I., Buffalo regional office, and did relate, at that time, to this agent, that their does exists overwhelming reasonable cause, to warrant an investigation, into the theft of, diversion of, and failure to account for, the Social Security Benefits paid out for PETER IANNACCONE, for those years including November 1976 thru June 1983, by the former Custodian of such Social Security funds payable to PETER IANNACCONE, Marie Law, the named Defendant, in this action, where such overwhelming reasonable cause for such investigation, has been entered into the record, of this case, and where, the definite evidence to prove such crime, beyond a reasonable doubt, can be obtained, by the release of the pertinent Social Security Administration records, relating to PETER and Mamie Iannaccone's accounts, including records of payments made for PETER IANNACCONE, for those years including November 1976 thru June 1983.

Your Deponent, further explained to F.B.I. agent Peter Trinkwalder, at that same time and day of December 4, 1996, that although Assistant U.S. Attorney, Kathleen M. Mehltretter, Chief of the Criminal Division, had informed, Your Deponent, on April 6, 1994, in a taped conversation, with Your Deponent, where such tape recording was filed into the record, of this case, on May 9, 1996, by Your Deponent, as Exhibit "F", and transcribed in Exhibit "G", that, she would investigate into the matter of PETER IANNACCONE'S Social Security payments being unaccounted for by Marie Law, for those years including November 1976 thru June 1983, and provide to, Your Deponent, a written statement as to the results of her investigation, no such written statement 'has yet been received by Your Deponent.

That, Your Deponent, did provide to F.B.I. agent Peter Trinkwalder, at that same time on December 4, 1996, at his request, the Social Security Case Chronological Summary, made by Your Deponent, and retained by agent Peter Trinkwalder, for his use,

Furthermore, Your Deponent, did reveal to F.B.I. agent Peter Trinkwalder, at that same time of December 4, 1996, other crimes, related to, yet, even much more serious than the

alleged crime involving this above captioned action, where such more so serious alleged crimes, have been documented and provided to Assistant U.S. Attorney Richard D. Kaufman, since 1985, to the recent time, by written correspondence, from Your Deponent.

That, although, Your Deponent, did request from F.B.I. agent Peter Trinkwalder, at that same time, of December 4, 1996, a written verification, from him, as to confirm our meeting, Mr. Peter Trinkwalder stated that no such verification of our meeting would be provided, to me, by him.

That, on December 6, 1996, F.B.I. agent Peter Trinkwalder, did telephonically contact me, to inform me, that, he had contacted U.S .Attorney, Kathleen M. Mehltretter, Chief of the Criminal Division, and that, she had informed him, that she would be providing, to me, a written statement, as to the results of her investigation into Marie Law, regarding the alleged misuse and non-accounting of Social Security funds, belonging to PETER IANNACCONE, including for those years of November 1976 thru June 1983.

Your Deponent, however, at the time of this writing, being January 10, 1997, has yet to receive any response, written or otherwise, from Ms. Kathleen M. Mehltretter, regarding her investigation of Marie Law, as promised, to Your Deponent, during our taped conversation, that took place on April 6, 1994, that was filed into the record of this case on May 9, 1996, by Your Deponent, as Exhibit "F", and transcribed in Exhibit "G"

25. That, in order to conclude compliance to the Order issued by this Court on November 14, 1996, Plaintiff-administrator and Co-committee needs additional time to receive response to his requests for counsel, including, from the two attorneys, whom, have yet not responded, as described herein on paragraph # 18, and needs additional time to make additional requests if needed, and needs additional time for potential counsel to review the extensive record of this action, and to provide an appropriate and legally sufficient response to, Your Deponent, and additional time to undertake whatever other actions necessary, to persuade this Court, to avoid dismissal of Plaintiff's Complaint and closure of this case, which would cause further severe injury and injustice, and hardship to the Estate of PETER IANNACCONE, to those entrusted to protect his estate, being, Your Deponent, and fellow Co-committee, Eleanor' Iannaccone, to his beneficiaries and contingent beneficiaries and creditors to his estate.

THEREFORE, Plaintiff-administrator and Co-committee, respectfully requests that this Court grant an extension of time to conclude compliance to the Order Issued by this Court on November 14, 1996, for obtainment of counsel, in the above captioned matter, up to and including April 14, 1997. And for, whatever further relief, that this Court shall deem just and proper.

S/S WILLIAM G. IANNACCONE
Plaintiff-administrator '&
Co-committee for the Person &
Estate of PETER IANNACCONE

Subscribed and sworn to

Before me this 10th day of January, 1997.

S/S KATHLEEN L FLEISCHER
NOTARY PUBLIC

TO: Ms. Beatrice Disman/Regional Commissioner
Social Security Administration. 26 Federal Plaza,
Roam 40-102 New York, New York, 10278

SSA CLAIMANT

WILLIAM G. IANNACCONE o/b/o PETER IANNACCONE,
SSN 712 -14-2693. WAGE EARNER (fully insured) MAMIE
IANNACCONE (spouse) 126-05-2576

AFFIDAVIT IN SUPPORT OF DISCLOSURE OF RECORDS

State at New York
County of Erie
City of Buffalo

WILLIAM G. IANNACCONE, being duly sworn, deposes and says:

1)Your Deponent is the only child of PETER IANNACCONE, deceased. The year of my birth is 1952. I reside in the County of Erie, State of New York.

2) Your Deponent has been appointed Administrator of the Estate of PETER IANNACCONE, by the Surrogate's Court of the County of Erie, on November 5, 1992, still valid and in full force.

3) Your Deponent has been the duly documented designated SSA Claimant's non-attorney representative since filing SSA form 561—U2 at the SSA District Office, on November 18, 1992., still valid and in full force.

4) Your Deponent has been appointed the Successor Co-committee for the Person and Estate of PETER IANNACCONE deceased incompetent, along with Eleanor Iannaccone, by N.Y.S. Supreme Court Order, on October 20, 1989 still valid and in full force.

5) Your Deponent has made this affidavit, in support of the action, for disclosure of records pertaining to PETER IANNACCONE under provisions included in the Privacy Act, as addressed and described in the accompanying request made to Beatrice Disman, SSA Regional. Commissioner, dated June 17, 1997.

6) I understand that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense.

S/S WILLIAM G. IANNACCONE,

Subscribed and sworn to before me
This 19th day of June 1997

S/S Carolyn M. Luczak
Notary Public

To: Beatrice Disman/ Regional Commissioner
Social Security Administration 26 Federal Plaza, Room 40-102
New York, New York, 10278

SSA CLAIMANT

William G. Iannaccone o/b/o
PETER IANNACCONE, SSN 712-14-2693)
Mamie Iannaccone (spouse)
SSN 126-05-2576

AFFIDAVIT IN SUPPORT OF DISCLOSURE OF RECORDS

State of New York)
County of Erie) ss
City of Buffalo)

ELEANOR IANNACCONE, being duly sworn, deposes and says:

1) Your Deponent is the niece of PETER IANNACCONE, deceased. The year of my birth is 1931. I reside in the County of Erie, State of New York.

2) Your Deponent has been appointed the Co-committee, together with William G. Iannaccone, for the Person and Estate of PETER IANNACCONE, deceased incompetent, by Order of the Supreme Court, dated October 20. 1989, still valid and in full force.

3) Your Deponent, has made this affidavit, in support of the action for disclosure of records pertaining to PETER IANNACCONE, under provisions included in the Privacy Act, as addressed and described in the accompanying request made to Beatrice Disman, SSA Regional Commissioner, dtd. June 17, 1997

4) I Understand that the knowing and willfull request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense.

S/S ELEANOR IANNACCONE

Subscribed and sworn to before me this 18th day of June, 1997.

LYNE ROCHE
Notary Public

U. S. Department of Justice
United States Attorney
Western District of New York

Federal center 716-846-4811

138 Delaware Ave FAX 716-846-3052
Buffalo, New York 14202

Tel.No.as of 5/19/95
(716)551-4811
FAX(716)551-3052
Writer's Extension: 871

April 24,1998

William G. Iannaccone
119 Ellen Drive
Cheektowaga, New York 14225

Re: IANNACCONE V. SSA COMMISSIONER. Et. AL.
95-CV-0555 S

Dear Mr. Iannaccone:

I am in receipt of your latest letter dated April 20,1998 whereby you request that I inform the Social Security Administration of their duty to answer your discovery requests related to your litigation. As you are aware, the Federal Rules of Civil Procedure contain specific procedures governing discovery in civil litigations and the method of which to compel such discovery. Therefore I would refer you to Rule 26, et. al. in order for you to use the full extent of your rights in completing your discovery. You may also want to consult the Local Rules of the Federal District Court for the Western District of New York for further guidance in dealing with these issues.

Very truly yours,
DENISE E. O'DONNELL
United States Attorney

BY: S/S Richard D Kaufman
Assistant U.S. Attorney

cc: Jane Wolfe, AUSA

since 1976, retroactive, since that's the ago he became eligible at age 65.
F. LAMBEHT HALEY: Alright.
WILLIAM G. IANNACCONE: And ah, I just want a point out the reason I don't have an attorney today, Your Honor, is because ah there has been a matter ah in front the Surrogate Court, Judge Mattina, and there has been certain attorneys that been involved in the case of ah Judge Mattina. And these attorneys have been investigated by the District Attorneys Office And, there are very few attorneys here in Erie County that are are willing to ah ah get other attorneys ah um in trouble, especially as serious as something like this. Um, I recall showing you yesterday a court document that was written by David Laub where it shows that he was aware that ta um um there was something concerning Social Security Administration because he was asking Marie Law to bring in any documents about Social Security payments.
F. LAMBERT HALEY: Are you suggesting or are you just stating now that David Laub is dishonest attorney, dishonorable man?
WILLIAM G. IANNACCONE: Unfortunatly, yes
F. LAMBERT HALEY: Alright, that's what you'are saying.
WILLIAM G. IANNACCONE: I think its its its very dangerous, he's very dangerous because I requested to him, in fact, you know, I have written a letter that I provided um..
F. LAMBERT HALEY: Well, you know, I understand what your saying.
WILLIAM G. IANNACCONE: In other words, Mr. Laub had been asked by the family of my father, and me directly, in writing, ah to make an inquiry of the Social Security Administration as to my father's eligibility to ah Social Security benefits, including Medicare, and this was back in 1984.
F. LAMBERT HALEY: Well, you were all ready taking care of that for your father, weren't you?
WILLIAM G. IANNACCONE: .What do you mean?
F. LAMBERT HALEY: You were taking care of his Social Security.
WILLIAM G. IANNACCONE: How do you mean?
F. LAMBERT HALEY: Going out to the office as early as 1984, inquiring. Why would Mr. Laub have to do that?
WILLIAM G. IANNACCONE: Because there was a problem they were not telling me the truth
F. LAMBERT HALEY: All right, O.K. Do you have anything further to say ?

WILLIAM G. IANNACCONE: Um.. Well I would just like to ah...I would like to submit an exhibit um a copy of that letter of May 10, 1984, instructing Mr. David Laub to ah ah inquire into the Social Security Administration.
F. LAMBERT HALEY: Are you sure that not part of the file?
WILLIAM G. IANNACCONE: Yes, yes. It is not.
F. LAMBERT HALEY:Alright. That will be an additional exhibit
WILLIAM G. IANNACCONE: Good. Also..
F.LAMBERT HALEY: Add this to the fil. please.
HEARING CLERK: I can't find..?.
LAMBERT HALEY: Where's the rest of the file?
WILLIAM G IANNACCONE: I've got it sir.
F. LAMBERT HALEY: Alright, why don't you hand It over, I'm marking this as an additional exhibit.
WILLIAM G. IANNACCONE: O.K.
HEARING CLERK: It's in the folder.
WILLIAM G. IANNACCONE: O.K. And I also want to
F. L.AMBERT HALEY: I'11 mark it.
WILLIAM G. IANNACCONE:...to provide um at this time to the file as an exhibit a letter of January 11, 1993, which is a letter to Joseph Mattina, County of Erie Surrogate Court, invol..ah ..concerning the estate of my father file number 92 5085 um, you know, which is which is a as Administrator I would of course um want to be still pending and a in that letter it explains ah that ah the issue of Social Security funds, um was a loss to the estate of my father and the approximate value of those funds is forty-thousand dollars and um I would just like to submit that, as evidence, I mean as an exhibit. And in addition to show you, Your Honor, that um the attorneys of the estate were ,in fact, you know, um investigated by the District Attorneys Office, are three letters written by Richard Kaufman,of the Distriot Attorney, ah dated May 4, 1989, June 18, 1985, and August 1, 1985, and I'd like to provide those as exhibits. They are again letters from the County of Erie District Attorney and their from Mr. Richard Kaufman. And um I would, .I do have the original of those letters and perhaps, you know,

EXHIBIT AC-3, PAGE 43 OF

you could compare the originals with the with the copies, and ah Well I would like file..you know, I would like for you to have the copies, but, I'd like you to compare the original with the file. Show that to the Judge.
F. LAMBERT HALEY': Look, are you telling me that these are true copies?
WILLIAM G. IANNACCONE: Yes they are.
F. LAMBERT HALEY: I believe.
WILLIAM G. IANNACCONE: I do have the originals hero if you want to see them.?.
LAMBERT HALEY: I do'nt want to see them I believe you.
WILLIAM G. IANNACCONE: You sure?
F. LAMBERT HALEY: Yes. Go on do you have something further you want to say?
WILLIAM G.IANNACCONE: O.K. Ah..
F. LAMBERT HALEY: These three letters, these will be one exhibit.
WILLIAM G. IANNACCONE: O.K.
F. LAMBERT HALEY: They will be exhibit 29. Go ahead.
WILLIAM G. IANNACCONE: So In other words, that's why I deal without an attorney because ah in Erie County its very difficult at time to locate an attorney who would be representing me urn because they would. .4 ..by representing me ah you know, get their colleagues in serious trouble, could be of a criminal nature.
F. LAMBERT HALEY: Alright. Alright sir.
WILLIAM G. IANNACCONE: And so in summary sir, I would just like to say that ta, again If my father would have had these widower's benefits from age 65, in 1976, he certainly would have been able to use them to benefit ah his life style, um like I already described, he was a very capable, industrious person who probably would have made furniture, ah um there's telling, you know, what he would have done. I know from my personal experience and anybody who knows him, could say that he was a very capable person, very very good worker, very capable person, that would have been able to do things around the house, and take care of the home, improve it, ah take care of the lawn, he cut the grass, he did the lawn, he pruned the bushes, everything that a normal individual would do to take care of a home. And this made his life a very very loss stressful and I am so happy that before he died that I was able to provide him with that type of lifestyle which was less stressful and more peaceful as Eleanor said. It was just an immense change

because he..the condition that he suffered was do to the fact that he was mistreated, and that was ah um extremely angered over the fact that he was un-willfully placed in Canandaigua without and he.. without his...him wanting to be there, that he was declared incompetent. This all angered him, very much. And ah um he even got very angry with the very thought that, you know, he was considered incompetent. Because he never considered himself incompetent. He never even considered himself um in any way ah mentally. .he wasn't unable to speak..he was unable to speak clearly like you and I, but this was a result of the electric shock treatments.
F. LAMBERT HALEY: Alright.
WILLIAM G. IANNACCONE: And his condition was was a result of his mistreatment most of his life, after the war, by the V.A.
F. LAMBERT HALEY: Alright sir, at this point...
WILLIAM G. IANNACCONE: And what we would like to do is is just have what my father..what my famlly..the family of my father feel and, as Committee and as Administrator we feel that my father is entitled...
F. LAMBERT HALEY: Not your father, the estate.
WILLIAM G. IANNACCONE: The estate is entitled to what my father should have received.
F. LAMBEHT HALEY: What? What?
WILLIAM G. IANNACCONE: The widower's benefits..?.
LAMBERT HALEY: Now lets get right down to It.
WILLIAM G. IANNACCONE: To the widower's benefits, since 1976,..
F. LAMBERT HALEY: Since 1976.
WILLIAM G. IANNACCONE: When he turned age 65.
F. LAMBERT HALEY: You feel that your entitled to it?
WILLIAM G. IANNACCONE: Well, the estate is.
F. LAMBERT HALEY: Well, your the only one that benefits.
WILLIAM G.IANNACCONE: Well, eventually I will be the beneficiary, yes.
F. LAMBERT HALEY: Not.But your the only one, there's no other one.
WILLIAM G.IANNACCONE: Well, my son is contingent beneficiary.
F. LAMBERT HALEY: Now, that's.. no you are the one.
WILLIAM G. IANNACCONE: Right now..
F.LAMBERT HALEY:

EXHIBIT AC-3.' PAGE 44 OF__.

COUNTY OF ERIE
Office of the

DISTRICT ATTORNEY

RICHARD J. ARCARA
DISTRICT ATTORNEY

TELEPHONE
716-855-2424

August 1, 1985

William G. Iannaccone
4030 North Bailey
Buffalo, New York 14226

Dear Mr. Iannaccone:

A review of your complaint regarding the estates of Mamie and Peter W. Iannaccone has been completed as to your allegations against Marie Law and James Kinney. No criminal action may be instituted against these individuals due to the time of the alleged wrongdoing occurring beyond the statute of limitations. Other actions by Law have not been supported by sufficient evidence to sustain our burden if charges were filed.

However, the balance of your complaint regarding the mishandling of the estates by numerous attorneys since 1982, will be examined in conjunction with this office's review of Surrogates Court and its operation.

Thank you for your patience you have shown in this matter.

Very truly yours,
RICHARD J. ARCARA
DISTRICT ATTO RNEY

BY: S/S RICHARD D. KAUFMAN
Assistant District Attorney
Special Investigations/
Prosecution Bureau

RDK:rab

EXHIBIT 29

COUNTY OF ERIE
OFFICE OF THE
DISTRICT ATTORNEY

KEVIN M. DILLON
DISTRICT ATTORNEY

TELEPHONE
716-855-2424

May 4, 1989

Mr. William Iannaccone
119 Ellen Drive
Cheektowaga, NY 14225

Re: Estate of Mamie Iannaccone

Dear Mr. Iannaccone:

This letter is written to provide you with notice that we received your letter dated May 2, 1989 and its attached documents. We will be reviewing these documents and adding them to the file which we have concerning the estate of Mamie Iannaccone. If we determine there is a need to reopen this investigation, we will contact you.

Thank you for your attention to this matter.

Very truly yours,

KEVIN M. DILLON
DIS TRICT ATTORNEY

BY:S/S RICHARD D. KAUFMAN
Assistant District Attorney
Special Investigations/
Prosecution Bureau

RDK/smg

EXHIBIT 29

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MISCELLANEOUS

Social Security Ruling 8l-29c

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-6185

WILLIAM G. IANNACCONE,
Plaintiff - Appellant,

v.

MARIE LAW, former "Custodian" of SSA,
Defe ndant-Counter-Claimant,

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,
Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE SOCIAL SECURITY ADMINISTRATION

DEFENDANT - APPELLEE

PRELIMINARY STATEMENT

This is an appeal by William Iannaccone, Plaintiff-Appellant, ("plaintiff") from an order of the United States District Court for the Western District of New York, Honorable William M. Skretny affirming the final decision of the Defendant-Appellee, Commissioner of Social Security ("the Commissioner"). The District Court granted the Commissioner's motion for judgment on the pleadings regarding plaintiff's allegations of an underpayment, and dismissed plaintiff's complaint.

The Commissioner now seeks an order reversing and remanding this case to the Commissioner for payment of the underpayment plaintiff seeks.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 42 U.S.C.§ 405(g). Judgment was entered in the district court on April 3, 2000, and a notice of appeal was filed on May 24, 2000. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether plaintiff's underpayment case should be reversed and remanded to the district court, since the Commissioner agrees to pay the underpayment benefits that plaintiff seeks for the period October 1976 to January 1984?

STATEMENT OF THE CASE

Peter Iannaccone ("Peter") filed an application for widower's benefits on April 23, 1992 (Tr. 125—27).(1) Plaintiff then filed a claim for amounts due a deceased beneficiary on behalf of his Peter, who had died (Tr. 125-27; 131-32). The application was approved, but authorized payment of benefits only since October 1991, six months before the date of the application (Tr. 135). This determination was affirmed on reconsideration (Tr. 138-41). Plaintiff then requested a hearing, which was held on July 13, 1993 (Tr. 30—54), July 14, 1993 (Tr. 55—85) and July 15, 1993

1 "Tr." refers to page citations in the transcript of the administrative record filed by the Commissioner as part of his answer. "P.A." refers to the corresponding page in Plaintiff's Appendix.

(Tr. 86-124)(2) The administrative law judge ("ALJ") before whom plaintiff appeared considered the case de novo and, on August 18, 1994 found that Peter was deemed to have filed an

application on January 25, 1984, but no earlier than that date (Tr. 25). The ALJ directed the agency to redetermine the past-due benefits to which plaintiff was entitled (Tr. 25).(3) The decision of the ALJ became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on May 9, 1995 (Tr. 10-11, repeated at Tr. 12-13).

Plaintiff then commenced a civil action in the United States District Court for the Western District of New York seeking review of the Commissioner's final decision pursuant to 42 U.S.C. § 405(g). The Hon. William M. Skretny, United States District Judge, dismissed plaintiff's complaint, holding that plaintiff required an attorney to proceed with his case, because he was representing Peter's estate.

(2) Indeed, the Notice of Hearing issued by the Administrative Law judge stated that the issue for the hearing as "Whether Widower's Benefits are payable prior to October 1991, based on the application filed April 12, 1992." (Tr. 26).

(3) The ALJ based his decision on his finding that the reason that Peter did not file earlier, was because he had relied on misinformation given by SSA employees (Tr. 22-25). The Social Security Act and regulations provide an exception to the filing requirement when misinformation by a government employee has been shown to have been given. See 42 U.S.C. § 402(j)(5); 20 C.F.R. § 404.633. This provision applies only with respect to misinformation furnished after December 1982 and to benefits for months after December 1982. See Pub. L. No. 101-239 § 10302, 103 Stat. 2481 (1989). Accord 20 C.F.R. § 404.633. Before that date, even if an application was not filed due to misinformation by an SSA employee, there could be no deemed filing of an application.
See Schweiker v. Hansen, 450 U.S. 785 (1981). Accord Social Security Ruling 81-29c.

Thereafter, plaintiff appealed the dismissal of the case to this Court. On April 27, 1998, this Court held that the district court had correctly dismissed the conversion claim against Marie Law, which plaintiff had brought in his capacity as administrator of the estate. Iannaccone v. Commissioner, 142 F.2d 553, 558 (2d Cir. 1998). This Court held that plaintiff was "purporting to represent the estate in litigating an interest specific to the estate", i.e. whether Law misappropriated Social Security benefits. Id.

In addition, this Court found that plaintiff's pro se claim against the Commissioner was based upon plaintiff's application filed pursuant to 42 U.S.C. § 404(d) for underpayment of Social Security benefits that were due his deceased father. Iannaccone, 142 F.3d at 559; see also Tr.

131. This Court also explained that plaintiff, not the estate, would be entitled to the benefits due under this claim since plaintiff, as Peter's sole surviving child, had priority over the Estate. Iannaccone, 142 F.3d at 559.

Thus, this Court remanded this action for further proceedings in the district court only insofar as it reversed the district court's dismissal of plaintiff's pro se claim against the Commissioner.

On remand, Judge Skretny found that the Commissioner's decision should be affirmed. Iannaccone v. Apfel, No. 95-555 (W.D.N.Y. Mar. 31, 2000), P.A at 132-45. Plaintiff appealed to this Court.

STATEMENT OF FACTS

Peter Iannaccone was born on March 2, 1911, and Mamie Iannaccone was born on March 30, 1918 (Tr. 115, 191). They were married in 1938 (Tr. 57). They were separated in 1944, but did not divorce (Tr. 57, 59). Peter was confined to the Veteran's Administration ("VA") psychiatric facility from 1944 to 1968 (Tr. 60). He was declared incompetent in 1960, but no committee was appointed for him at the time (Tr. 41, 60). He received VA benefits since 1945 (Tr. 120)

Mamie filed an application for disability insurance benefits and was found to be entitled to such benefits as of October 1976 (Tr. 198). Peter filed an application for retirement insurance benefits on his own account in November 1976 when he reached the age of sixty-five (Tr. 191). However, he did not have sufficient quarters of coverage to meet the insured status requirement for entitlement to retirement benefits, and his application was denied (Tr. 194, 195, see Tr. 46). Mamie died on October 15, 1978 (Tr. 36, 119, 198). In February 1979, an application was filed for the lump-sum death benefit on Mamie's account (Tr. 98, 99). The lump sum death benefit was paid to Peter in March 1979 (Tr. 199). No application for spouse's benefits was filed by Peter.

In 1983 and 1984, plaintiff petitioned the state court for appointment of a committee for Peter (Tr. 281-83). In June 1984, Horace A. Gioia was appointed by the court as the committee of the person and property of Peter (Tr. 169-72, repeated at Tr. 188-90). In October 1989, plaintiff petitioned for a change of committee, and the court appointed plaintiff

and Eleanor Iannaccone as cocommittee for Peter (Tr. 81, 142-45, 146, 153, 169) . Still, no application was filed with SSA for widower's benefits.

Plaintiff inquired in 1992 as to whether Peter was entitled to Medicare benefits. At that time, he learned that Peter could apply for widower's insurance benefits on Mamie's account (Tr. 96-97)

Peter died on April 20, 1992 (Tr. 147). Plaintiff was subsequently named executor of Peter's estate (Tr. 174, 362, 363).

ARGUMENT

THIS CASE SHOULD BE REVERSED AND REMANDED TO THE DISTRICT COURT SINCE PLAINTIFF WILL RECEIVE ALL UNDERPAYMENTS DUE HIM FOR THE PERIOD OCTOBER 1976 TO JANUARY 1984.

1. Statutory and Regulatory Standard

To be entitled to benefits, a claimant must file an application. 20 C.F.R. § 404.603. An application for monthly benefits under Title II of the Act generally must be filed on a form provided for such purpose and signed by the applicant. 20 C.F.R. § 404.611. A court appointed representative may file for an incompetent person. 20 C.F.R. § 404.612.
An application is considered to have been filed when it is received at an office of the Social Security Administration or by an employee of the Administration who is authorized to receive such application at a place other than such an office. 20 C.F.R. § 404.614.

2. Plaintiff Will Receive an Underpayment for the Period October 1976 to January 1984.

In light of Peter's incompetence and the fact that he filed for retirement benefits in 1976, when he was Mamie's spouse, the Commissioner is willing to construe his retirement application as an application for spouse's benefits. Accordingly, the Commissioner also is willing to pay benefits from October 1976, the earliest point Peter could have been entitled on Mamie's account had he filed an application for spouse's benefits.(4)Plaintiff's Brief at 29.

Thus, the sole issue in this case, plaintiff's underpayment claim, is moot, since plaintiff will receive a full remedy for his underpayment claim. The Supreme Court has made clear that "no justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments." Flast v. Cohen, 392 U.S. 83, 95 (1968). In particular, mootness is established when "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).

(4)Mamie became entitled to disability benefits in October 1976 (Tr. 198) . Plaintiff claims that Peter was entitled to benefits since May 1976. Plaintiff's Brief at 29. Nonetheless, Peter could not have received benefits before the month in which Mamie became entitled to her own benefits. See 20 C.F.R. § 404.130.

3. There Are No Other Issues Properly Before this Court

Plaintiff also raises other issues in his complaint which pertain to the dismissed action against Marie Law. Plaintiff's Brief at passim. The district court correctly concluded that "whether or not Marie Law would have been a proper defendant was made moot by the fact that that claim was no longer extant." Iannaccone v. Apfel, No. 95-555 at 4, n.3. P.A. 135.

Thus the "law of the case" doctrine applies here. As this Court has held, when an appellate court has once decided an issue, the trial court is under a duty to follow the appellate court's ruling on that issue. Doe o/b/o Doe v. New York City Department of Social Services, 709 F.2d 782, 787—788 (2d Cir. 1983)

Therefore, plaintiff's claims against Marie Law are not properly before this Court.

4. There is No Basis to Award Damages In A Social Security Underpayment Case.

Plaintiff seeks damages in this case. Plaintiff's Brief at iii. However, in a case involving a finding of an underpayment there is no authority to pay damages. It is well settled that, as

sovereign, the United States, in the absence of its consent, is immune from suit. See United States v. Sherwood, 312 U.S. 584, 5 86-87 (1941). Additionally, without separate and express Congressional consent to award damages, the government is immune from a damages award. Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). Moreover, any waiver of immunity must be "'construed strictly in favor of the sovereign,'" and not "'enlarge[d] . .beyond what the language requires.'" Ruchelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) (citations omitted)

Congress has waived the government's sovereign immunity of claims arising under Title II of the Social Security Act; 42 U.S.C § 405(g) is the sole remedy for such cases. Weinberger v. Salfi, 422 U.S. 749, 756-61 (1975) . The Social Security Act makes no provision for remedies in money damages. See Schweiker v. Chilicky, 487 U.S. 412, 424 (1988)

Accordingly, plaintiff is not entitled to any damages. To the extent that he seeks damages based on alleged actions by Marie Law, she is not a party to this action. Iannaccone, 142 F.3d at 559 (5)

(5) Finally, plaintiff seeks costs and interest in this action. P1. Brief at 29-30. To the extent that plaintiff seeks costs on his prior appeal, he should have raised that issue at the time of his prior appeal. See U.S. v. Twentieth Century Fox Film Corp., 926 F.2d 227 (2d Cir. 1991). Further, there is no interest available for back payments in Social Security cases. Nor is there payment available for work performed by a pro se plaintiff. See 28 U.S.C. § 2412 and 42 U.S.C. § 406.

CONCLUSION

The Commissioner respectfully submits that the decision of the district court be reversed and remanded to the Commissioner for the purpose of issuing a fully favorable decision on plaintiff's underpayment claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I, Hereby certify that on September 8, 2000 I served two (2) copies of the submissions served on this Court by the Appellee, Kenneth S.. Apfel Commissioner of Social Security, by Certified mail to:

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And

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S/S Clementine Redwine
Legal Assistant
Office of the General Counsel
Region II
Social Security Administration

Sworn before me this
8th dayof Sept. 2000

S/S MARLA J. PIAZZA
Notary Public, State of New York
No. 02P16004945
Qualified in Chautauqua County
Commission Expires March 30, 2002.